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No. 9553

United States

Circuit Court of Appeals

For the Ninth Circuit.

Vol  
2215

JOSEPH GOLDIE,

Appellant,

vs.

STERLING CARR, Receiver of Estate of Herbert  
Fleishhacker, Debtor,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United  
States for the Northern District of California,  
Southern Division.

FILED

JUL 18 1940

PAUL P. O'BRIEN,

CLERK







United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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JOSEPH GOLDIE,

Appellant,

vs.

STERLING CARR, Receiver of Estate of Herbert  
Fleishhacker, Debtor,

Appellee.


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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Appellee

---

In the United States District Court for the North-  
ern District of California, Southern Division

No. 30924-S

In the Matter of HERBERT FLEISHHACKER,  
Debtor.

PETITION FOR SUMMARY ORDER DI-  
RECTED TO JOSEPH GOLDIE TO TURN  
OVER TO RECEIVER CERTAIN SECURI-  
TIES AND MONEYS BELONGING TO  
DEBTOR:

To the Honorable Judges of the United States Dis-  
trict Court for the Northern District of Cali-  
fornia, and to Honorable Burton J. Wyman,  
Referee in Bankruptcy for said Court, at San  
Francisco, California:

The petition of Sterling Carr respectfully repre-  
sents:

I.

That ever since the 26th day of January, 1939



petitioner has been and now is the duly and regularly appointed, qualified and acting Receiver for the estate of Herbert Fleishhacker, the above named Debtor;

## II.

That at all of the times herein mentioned, Rainier Brewing Company, Inc. was and now is a corporation incorporated, organized and existing under and by virtue of the laws of the [1\*] State of California, duly authorized to do business, and doing business, in said State, and with its principal place of business in the City and County of San Francisco, in said State;

That the capital stock of said corporation is divided into shares of "Class "A" common stock and Class "B" common stock;

## III.

That at all of the times herein mentioned, Pacific Products, Inc. was and now is a corporation incorporated, organized and existing under and by virtue of the laws of the State of California, duly authorized to do business, and doing business, in said State, and with its principal place of business in the City and County of San Francisco, in said State;

## IV.

That upon the 29th day of September, 1937, Herbert Fleishhacker, the Debtor herein, and Joseph Goldie made and entered into a written agreement,

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

a copy of which is hereunto annexed, marked "Petitioner's Exhibit A" and made a part hereof, as fully as if set forth in full herein;

V.

That amongst the assets of said Debtor delivered to your Receiver were certain claims of said Debtor against the said Joseph Goldie in accordance with the terms and provisions of said agreement, a copy of which is hereunto annexed;

VI.

That in accordance with the terms of said agreement, said Joseph Goldie agreed, within a period of two years from September 29, 1937, to deliver to said Herbert [2] Fleishhacker three thousand (3000) shares of the Class "A" common stock of said Rainier Brewing Company, Inc., and further agreed, as collateral for the performance of the terms of the aforementioned agreement, to deliver to the said Herbert Fleishhacker, five hundred thirtynine (539) shares of Class "A" Cumulative Preferred stock of Pacific Products, Inc. immediately after the execution of said agreement;

VII.

That in accordance with the terms of said agreement, said Joseph Goldie further agreed to deliver to Herbert Fleishhacker, said Debtor, any and all dividends received by the said Goldie declared on and after the 29th day of September, 1937 upon said 3,000 shares of the Class "A" common stock of Rainier Brewing Company, Inc.



## VIII.

Petitioner further alleges that the said Joseph Goldie at all of the times herein mentioned, up to and including the 23d day of November, 1938, has failed and refused to deliver to the said Herbert Fleishhacker said 539 shares of Pacific Products, Inc. Class "A" 7% Cumulative Preferred stock as collateral under the terms of said agreement;

That the said Goldie has also failed to deliver to the said Herbert Fleishhacker any or all of the dividends that the said Goldie has received since September 29, 1937 upon said 3,000 shares of Class "A" common stock of Rainier Brewing Company, Inc., save and except the sum of eighteen hundred (1800) dollars which was paid on the 20th day of September, 1938; [3]

## IX.

That petitioner further alleges that the following dividends have been declared by said Rainier Brewing Company, Inc. on Class "A" common stock, the proceeds of which have been received by the said Joseph Goldie, to wit:

October	21, 1937—	\$1.30	per share
November	20, " —	.15	"
Sept.	16, 1938—	.60	"
October	24, " —	1.15	"
December	29, " —	.60	"

Payable as follows:

January	10, 1939—	20¢	per share
February	" " —	"	"
March	" " —	"	"

Petitioner alleges that the said Joseph Goldie, on and after the 29th day of September, 1937 and up to the present date, has received the total sum of \$11,400.00 on said 3,000 shares of common stock of Rainier Brewing Company, Inc. as dividends, and which dividends, under the terms of said agreement herein referred to, were agreed to be paid by the said Goldie to the said Herbert Fleishhacker; that no part of said sum has been paid to the said Herbert Fleishhacker save and except said sum of \$1,800.00; that there is now due and payable to the said Herbert Fleishhacker, Debtor herein, and to Sterling Carr, Receiver for the estate of said Debtor, the sum of nine thousand six hundred & 00/100 (9,600) dollars;

X.

Your petitioner further alleges that demand has been made upon the said Joseph Goldie by your petitioner as Receiver for the estate of Herbert Fleishhacker, Debtor, for the delivery to said Receiver of said 539 shares of Pacific Products, Inc. to be held by said Receiver as collateral under the terms of said agreement, and for the sum of \$9,600. due the said Herbert Fleishhacker in accordance with the terms of said agreement; [4] that at all of the times herein referred to, the said Joseph Goldie has failed and refused and still fails and refuses, without right or cause, to deliver to your petitioner the said 539 shares of Pacific Products, Inc. or said sum of \$9,600.00 or any part thereof;



## XI.

That in accordance with the terms of said agreement, a copy of which is attached hereto and marked "Exhibit A", the said Herbert Fleishhacker, Debtor herein, at all of the times herein mentioned was and now is entitled to delivery to him of said 539 shares of Pacific Products, Inc.; that the said Joseph Goldie is now holding said 539 shares in trust for the said Herbert Fleishhacker;

That since the execution of said agreement the said Joseph Goldie has received the total sum of \$11,400.00 as dividends on said 3000 shares of Class "A" common stock of Rainier Brewing Company, Inc.; that by the terms of said agreement, the said Herbert Fleishhacker is entitled to receive said sum, but that no part thereof has been paid to said Herbert Fleishhacker save and except said sum of \$1,800.00, and that said Joseph Goldie is now holding the balance of said dividends, to wit, the sum of \$9,600.00, in trust for the said Herbert Fleishhacker, the Debtor above named;

Wherefore, petitioner prays:

(1) That this Court issue its order directed to the said Joseph Goldie, to show cause, if any he has, upon a date certain, to be fixed by this Court, why he should not be ordered, compelled and required to turn over and deliver to petitioner as such Receiver, 539 shares of Class "A" 7% Cumulative Preferred stock of Pacific Products, Inc. in accordance with the terms of said agreement specifically set forth in said Petitioner's Exhibit "A" attached

hereto, together with dividends aggregating [5] the sum of \$9,600.00 due petitioner as such Receiver in accordance with the provisions of said agreement;

(2) And for such further and additional relief as this Court shall deem proper.

STERLING CARR,

Receiver for the Estate of  
Herbert Fleishhacker,  
Debtor,

Petitioner.

FRANCIS P. WALSH,

LOUIS J. GLICKSBERG,

Attorneys for Petitioner. [6]

United States of America,  
Northern District of California,  
City and County of San Francisco—ss.

Sterling Carr, being first duly sworn, deposes and says:

That he is the petitioner named and described in the foregoing petition; that he has read the same and knows the contents thereof, and hereby makes solemn oath that the statements therein contained are true according to his best knowledge, information and belief.

STERLING CARR.

Subscribed and sworn to before me this 29th day of March, 1939.

[Seal]

LOUIS WIENER,

Notary Public in and for the City and County of  
San Francisco, State of California. [7]



PETITIONER'S EXHIBIT "A"  
AGREEMENT

Whereas, Joseph Goldie is obligated to Herbert Fleishhacker entitling the said Herbert Fleishhacker to receive from the said Joseph Goldie, 3,000 shares of the Rainier Brewing Company, Inc., a corporation, Class "A" common stock; and

Whereas, the said Joseph Goldie desires to assure the said Herbert Fleishhacker of the ultimate payment of said obligation for the delivery of said 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class "A" common stock; and

Whereas, Pacific Products, Inc., a corporation, is the owner of 59,622 shares of the Class "A" common stock of the Rainier Brewing Company, Inc., a corporation, and 258,092 shares of the Class "B" common stock of the Rainier Brewing Company, Inc., a corporation; and

Whereas, Joseph Goldie is the owner of 1924-4/10ths shares of the Class "A" 7% Cumulative Preferred stock of Pacific Products, Inc., a corporation; and

Whereas, it is the desire of the parties hereto that the said Joseph Goldie pledge to Herbert Fleishhacker so much of the Class "A" 7% Cumulative Preferred stock of Pacific Products, Inc., a corporation, owned by him as will secure to the said Herbert Fleishhacker the ultimate delivery to him by [8] said Joseph Goldie of 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class "A" common stock.

Now therefore, this agreement,

Witnesseth:

That the parties hereto shall forthwith upon the execution of this agreement cause to be delivered to the transfer agent of Pacific Products, Inc., a corporation, the stock certificate now standing in the name of Joseph Goldie, representing his ownership of 1,924-4/10ths shares of Pacific Products, Inc., a corporation, Class "A" 7% Cumulative Preferred stock, with directions to said transfer agent and company to split said certificate into one certificate of 539 shares and one certificate of 1,385-4/10ths shares, each of said certificates as split to be reissued by said company and said transfer agent in the name of Joseph Goldie.

It is further mutually agreed and understood between the parties hereto that said certificate representing 539 shares of Pacific Products, Inc., a corporation, Class "A" 7% Cumulative Preferred stock, shall be forthwith by said Joseph Goldie endorsed and delivered to said Herbert Fleishhacker, and shall thenceforth be held in pledge by said Herbert Fleishhacker, subject however to the following express agreements.

That the said Joseph Goldie may at any time within two years from the date of this agreement acquire and deliver to the said Herbert Fleishhacker 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class "A" common stock, and upon [9] delivery of such stock of Rainier Brewing



Company, Inc., a corporation, the said Pacific Products, Inc., a corporation, stock hereby pledged shall be forthwith returned to the said Joseph Goldie by the said Herbert Fleishhacker, and the said obligation of each of the parties hereto shall thereby stand discharged in full.

It is further expressly agreed and understood that the said Joseph Goldie may at any time within two years of the date of this agreement pay in lawful money of the United States of America to the said Herbert Fleishhacker, the equivalent of the market value at the time of said payment of 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class "A" common stock, and shall thereupon be entitled to the return of the stock of the Pacific Products, Inc., a corporation, hereinabove provided to be pledged to the said Herbert Fleishhacker, and thereupon the obligation of the parties hereto, each to the other, shall stand discharged in full.

It is further expressly agreed and understood that Joseph Goldie may at any time within two years of the date of this agreement pay to the said Herbert Fleishhacker in lawful money of the United States of America, the equivalent of the market value at the time of said payment of not less than 750 shares of Rainier Brewing Company, Inc., a corporation, Class "A" common stock, and shall thereupon be entitled to the return of 25% of the Pacific Products, Inc., a corporation, [10] stock hereby pledged to the said Herbert Fleishhacker,

and upon each successive payment of not less than 25%, or the delivery of not less than 750 shares of Rainier Brewing Company, Inc., a corporation, Class "A" common stock to the said Herbert Fleishhacker, shall forthwith be entitled to the return of an additional 25% of the said stock hereby pledged to the said Herbert Fleishhacker, until such time as the full amount of said 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class "A" common stock, has been delivered to the said Herbert Fleishhacker, or the full amount of the value of the said 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class "A" common stock has been paid to the said Herbert Fleishhacker.

It is further expressly understood and agreed that Joseph Goldie may at his option at any time within two years from the date of this agreement, sell, transfer or set over absolutely to the said Herbert Fleishhacker 450 shares of Pacific Products, Inc., a corporation, Class "A" 7% Cumulative Preferred stock, and upon such transfer of said 450 shares to the said Herbert Fleishhacker the obligation of the parties hereto, one to the other, shall stand discharged in full.

It is further expressly understood and agreed that during the life of this agreement any dividends declared and paid by the said Pacific Products, Inc., a corporation, on the said shares of stock hereby deposited with the said Herbert [11] Fleishhacker, which dividends are paid from funds ac-



quired by the said Pacific Products, Inc. from any source other than from moneys paid to it as dividends on stock owned by it of Rainier Brewing Company, Inc., a corporation, shall not be payable to the said Herbert Fleishhacker but shall constitute dividends payable to the said Joseph Goldie.

It is further expressly understood and agreed that during the life of this agreement that as to all dividends declared and paid by the Rainier Brewing Company, Inc., a corporation, to Pacific Products, Inc., a corporation, which in turn give rise to payments of dividends by the Pacific Products, Inc., a corporation, to its stockholders, the said Herbert Fleishhacker shall receive such portion of such dividends as would be paid to him were he the owner of 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class "A" common stock.

It is further expressly understood and agreed that the provisions of the within agreement embrace the entire agreement on the subject matter between the parties hereto, and cancels, supersedes and replaces all prior and other agreements, and the benefits and obligations herein set forth flowing to and from each of the parties hereto shall inure to and be binding upon the heirs, administrators and assigns of the parties hereto. [12]

In witness whereof, we have hereunto set our hands and seals this 29th day of September, 1937.

(Signed) JOSEPH GOLDIE

(Signed) HERBERT FLEISHHACKER

[Endorsed]: Filed Apr. 3, 1939. [13]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE DIRECTED TO  
JOSEPH GOLDIE

Sterling Carr, Receiver for the estate of Herbert Fleishhacker, the Debtor above named, having filed herein his petition praying for an order directed to Joseph Goldie, to show cause why he should not be compelled and required to turn over and deliver to said Receiver 539 shares of Class "A" 7% Cumulative Preferred stock of Pacific Products, Inc., a corporation, in accordance with the provisions of a certain agreement specifically set forth in said petition, together with dividends in the sum of \$9,600.00 due petitioner as such Receiver in accordance with the terms of said agreement; and

Good cause appearing therefor, it is hereby ordered that said Joseph Goldie show cause, if any he has, before the undersigned Referee in Bankruptcy at his courtroom, Room 609 [14] Grant Building, 1095 Market Street, San Francisco, California, on the 14th day of April, 1939, at the hour of 10 A. M., why said petition of said Receiver should not be granted; and

It is further ordered that a copy of this order to show cause, together with a copy of said petition, be served upon the said Joseph Goldie at least 5 days before the return date hereof.

Dated: April 3rd, 1939.

BURTON J. WYMAN,  
Referee in Bankruptcy.

[Endorsed]: Filed Apr. 3, 1939. [15]

[Title of District Court and Cause.]

VERIFIED PLEA OF RESPONDENT JOSEPH  
GOLDIE OBJECTING TO THE SUMMARY  
JURISDICTION OF THE ABOVE EN-  
TITLED COURT AND FOR AN ORDER  
QUASHING SERVICE OF ORDER TO  
SHOW CAUSE DIRECTED TO SAID RE-  
SPONDENT AS ISSUED BY THE ABOVE  
ENTITLED COURT.

To the Honorable, the Judges of the United States  
District Court for the Northern District of  
California, and to Honorable Burton J.  
Wyman, Referee in Bankruptcy for said Court  
at San Francisco, California:

Now comes Joseph Goldie, of the City and County  
of San Francisco, State and District aforesaid, *re-*  
*spondent* to an order to show cause issued by the  
above entitled court on the [16] 3d day of April,  
1939, and returnable on the 14th day of April,  
1939, and appearing specially and not otherwise for  
the purpose of objecting to the summary jurisdic-  
tion of the above entitled court and moving said  
court for an order quashing the service of said  
order to show cause, and for grounds of his plea  
objecting to the jurisdiction of the above entitled  
court alleges:

1. That it affirmatively appears from the pe-  
tition of the receiver, Sterling Carr, upon which  
said order to show cause was issued by the above



entitled court, that the above entitled court was and is without jurisdiction to hear and determine the matters therein stated or to make any order against the respondent therein named except by consent of this respondent, and that this respondent has never consented to submit himself to the jurisdiction of the above entitled court, but, on the contrary, this respondent has declined and does decline to submit himself to the jurisdiction of the above entitled court to hear and determine any of the matters set forth in said receiver's petition or be subjected to any orders of the above entitled court pertaining to any of the matters set forth in said receiver's petition.

2. That it affirmatively appears from the face of said receiver's petition and the order to show cause issued by the above entitled court, that the facts stated in said receiver's petition do not confer upon the above entitled court summary jurisdiction over said respondent without his consent.

3. That it affirmatively appears from said receiver's petition, upon which said order to show cause was issued, and from said order to show cause, that the issues which the receiver seeks to submit to the above entitled court as grounds for the granting of the prayer of said petition can only be determined in a plenary action and not in a summary proceeding instituted by said receiver herein, and it affirmatively appears from said petition that no summary jurisdiction can be exercised by the

[17] above entitled court as it relates to this respondent without the consent of this respondent.

That this respondent is entitled to have said issue determined in a plenary action and to have a trial by jury of the issues raised in said petition pursuant to his demand.

For a further, separate and distinct objection to the summary jurisdiction of the above entitled court, this respondent alleges as follows, to-wit:

That at the time of the making of the contract, a copy of which is attached to the petition of the receiver herein, the property referred to in said contract as constituting one thousand nine hundred twenty-four and four-tenths (1,924  $\frac{4}{10}$ ) shares of the preferred stock of Pacific Products, Inc., a corporation, Class "A" Cumulative 7%, was not in the possession of respondent, Joseph Goldie, nor in the possession of Herbert Fleishhacker, but, on the contrary, said stock, and each and every share thereof, had been theretofore pledged by respondent to the Anglo California National Bank to secure the repayment by respondent of a sum of money owing by respondent to said Anglo California National Bank, aggregating at the time of the making of said contract the sum of One Hundred Thirty-six Thousand Six Hundred Thirty-eight and  $\frac{62}{100}$  Dollars (\$136,638.62);

That said stock, and each and every share thereof, was held by said Anglo California National Bank as security for the repayment by respondent of the sum of money hereinabove set forth;

That at the time of the making of said contract, it was agreed that Herbert Fleishhacker and respondent would obtain a release by said Anglo California National Bank of so much of said stock as was agreed in said contract would be deposited with the said Herbert Fleishhacker, to-wit, five hundred thirty-nine (539) shares;

That at no time prior to the making of said contract [18] or at the time of the making thereof was the respondent the owner of any shares of Rainier Brewing Company, Inc., a corporation, Class "A" Common Stock, but all of the interest of said respondent in said Rainier Brewing Company, Inc., a corporation, was represented by respondent's ownership, subject to the pledge to the Anglo California National Bank, as aforesaid, of the one thousand nine hundred twenty-four and four-tenths (1,924  $\frac{4}{10}$ ) shares of the Pacific Products, Inc., a corporation, Class "A" 7% Cumulative Preferred stock referred to in said contract, and at no time was it within the terms of the agreement between respondent and said Herbert Fleishhacker that both the five hundred thirty-nine (539) shares of Pacific Products, Inc., a corporation, Class "A" 7% Cumulative Preferred stock, and three thousand (3,000) shares of Rainier Brewing Company, Inc., a corporation, Class "A" Common stock, would be delivered to Herbert Fleishhacker in pledge.

Respondent further alleges that at the time of the making of said agreement, it was being dis-



cussed amongst the owners of all of the corporate stock of the Pacific Products, Inc., a corporation, that the assets of the Rainier Brewing Company, Inc., a corporation, would be transferred to Pacific Products, Inc., a corporation, and, thereupon, the name of the Pacific Products, Inc., a corporation, would be changed to that of the Rainier Brewing Company, Inc., a corporation, and that the Rainier Brewing Company, Inc., a corporation, then in existence at the time of the making of said contract would be dissolved, and upon the happening of said events respondent would have been in a position to deposit with the said Herbert Fleishhacker three thousand (3,000) shares of Rainier Brewing Company, Inc., a corporation, Class "A" Common stock, if and when said three thousand (3,000) shares were released from the pledge of the Anglo California National Bank;

That respondent was informed by Herbert Fleishhacker that if respondent would give to him an agreement pledging three [19] thousand (3,000) shares of Rainier Brewing Company, Inc., Class "A" Common stock, when the reorganization above referred to was accomplished, he, the said Herbert Fleishhacker, would be able to get released from the pledge of the Anglo California National Bank said three thousand (3,000) shares of Rainier Brewing Company, Inc., a corporation, Class "A" Common stock.

That thereafter, and on or about November 30th, 1937, all of the corporate assets of the Rainier

Brewing Company, Inc., a corporation, were transferred to Pacific Products, Inc., a corporation, and the name of the Pacific Products, Inc., a corporation, was changed to Rainier Brewing Company, Inc., a corporation. The Anglo California National Bank delivered to the transfer agent all of the stock in the Pacific Products, Inc., a corporation, owned by respondent. Said stock was cancelled and there was reissued in the name of respondent the number of shares necessary to represent respondent's new ownership in the Rainier Brewing Company, Inc., formerly known as Pacific Products, Inc., a corporation, whereupon, respondent and Herbert Fleishhacker requested the Anglo California National Bank to deliver to the said Herbert Fleishhacker three thousand (3,000) shares of Rainier Brewing Company, Inc., Class "A" Common stock, which the said Anglo California National Bank refused to do.

That the one thousand nine hundred twenty-four and four-tenths (1,924  $\frac{4}{10}$ ) shares of Pacific Products, Inc., a corporation, Class "A" 7% Cumulative Preferred stock referred to in said agreement between respondent and the said Herbert Fleishhacker were cancelled and became worthless.

That upon the refusal of said Anglo California National Bank to deliver to Herbert Fleishhacker three thousand (3,000) shares of the Rainier Brewing Company stock referred to hereinabove, the agreement of September 29th, 1937, became inoperative and of no force and effect; [20]

That it became necessary, by reason of said inability of the parties to carry out the terms of said agreement that a new agreement be made, in the meantime of which respondent made certain payments of money to Herbert Fleishhacker, aggregating the sum of One Thousand Eight Hundred Dollars (\$1,800.00).

That at no time since the making of said contract referred to herein have any shares of Rainier Brewing Company, Inc., a corporation, Class "A" Common stock, either of the old company or of the new company, or any of the stock of the Pacific Products, Inc., a corporation referred to in said contract, been in the possession, actual or constructive, of respondent or Herbert Fleishhacker, or of the Receiver of the estate herein, but, on the contrary, at all times said stock, and each and every share thereof has been and now is in the possession of the Anglo California National Bank and is subject to the terms of a contract of pledge between respondent and said Anglo California National Bank.

Respondent alleges that any order granting the prayer of the receiver herein would be in excess of the jurisdiction of the above entitled court and that it would be a physical impossibility to comply with any order of this court relative to Pacific Products, Inc., a corporation, stock, as said stock is no longer in existence; that any order against respondent in relation to Rainier Brewing Company stock formerly known as Pacific Products, Inc., a corpora-



tion, would be impossible to comply with as the possession, both actual and constructive, of each and every share of said stock is in the Anglo California National Bank, subject to the terms of the pledge by respondent.

That a true controversy exists between respondent and the estate herein as to what obligation, if any, respondent has to the said estate.

Wherefore, respondent prays that service of the order [21] to show cause issued by the above entitled court may be ordered quashed on account of lack of jurisdiction of the above entitled court to have issued said order to show cause.

JOSEPH GOLDIE,  
Respondent.

United States of America,  
Northern District of California,  
City and County of San Francisco—ss.

Joseph Goldie, being first duly sworn, deposes and says:

That he is the respondent named and described in the foregoing Plea of objections to the summary jurisdiction of the above entitled court; that he has read said Plea, knows the contents thereof and hereby makes solemn oath that the statements therein contained are true, according to his best knowledge, information and belief.

JOSEPH GOLDIE.

Subscribed and sworn to before me this 12th day of April, 1939.

[Seal] LOUIS WIENER,  
Notary Public in and for the City and County of  
San Francisco, State of California.

Receipt of a copy of the within Verified Plea of Respondent is hereby admitted this 13 day of April, 1939.

FRANCIS P. WALSH,  
LOUIS GLICKSBERG,  
Attorneys for Receiver Sterling Carr.

[Endorsed]: Filed Apr. 13, 1939. [22]

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[Title of District Court and Cause.]

Before: Honorable Burton J. Wyman, Referee in  
Bankruptcy.

HEARING ON OBJECTION TO JURISDIC-  
TION (JOSEPH GOLDIE)

Friday, April 21, 1939, 10 A. M.

Appearances:

Francis P. Walsh, Esq., and Louis J. Glicks-  
berg, Esq., Attorneys for Receiver;  
Harry S. Young, Esq., Attorney for Debtor;  
Messrs. Torregano & Stark, by C. M. Stark,  
Esq., Attorney for Joseph Goldie. [23]

The Referee: Take up the matter of Goldie.

Mr. Stark: In that matter, if the court please,  
Mr. Goldie has filed a verified plea to the jurisdic-

tion of this Court to hear and determine any controversy between Mr. Carr and himself, and as I understand the procedure, your Honor is required as a matter of law to make inquiry into the foundation and basis of the attack on the jurisdiction of the Bankruptcy Court and to rule thereon; whereupon, as I recall the holding in the case of Pierson vs. Higgins, with which your Honor no doubt is familiar, it will become the duty of the receiver to establish the factual matters of his petition that would entitle him to any relief under his prayer and that the respondent, Mr. Goldie, would have the opportunity to present the factual matters that would tend to deny to the petitioner the relief sought under his prayer. I also understand it to be the law that where the respondent has filed a verified plea to the jurisdiction of this Court, that it becomes the duty of the receiver to establish the existence of jurisdiction. There is no presumption of the jurisdiction by the simple filing of the petition.

Mr. Walsh: If your Honor please, in reply to that contention, I might state that the receiver has met the presumption by his pleadings and when the plea to the jurisdiction is raised, the burden is upon the respondent to show at this time that this Court has no jurisdiction to go ahead in this matter. In other words, as the cases hold, the Court has the right to try out the entire matter on the plea to the jurisdiction and if the evidence shows that the con-



tention of the respondent is not meritorious or his right as against the receiver is colorable, then the Court is bound to go ahead and has the jurisdiction. In other words, we have alleged this matter in our pleading and have attached to the [24] pleading a copy of the agreement, to which there has been no meritorious defense—to that petition. I might state, if your Honor please, that we have set forth in our petition that Mr. Goldie, under this contract, owes Mr. Fleishhacker, the debtor, or the receiver now, the sum of money now due from dividends which were paid on stock of the Rainier Brewing Company. Now, I will point out to your Honor there is absolutely no issue raised in this answer on the plea to the jurisdiction or in the plea on the merits, which is set forth in this answer, raising any issue as to the payment of these dividends.

Mr. Stark: Of course, I cannot, as your Honor well knows, attack the jurisdiction of your Honor and in the same breath ask for anything affirmative. The scope of my pleading was to assert that no jurisdiction existed in this Court to determine any matters in regard to Mr. Goldie and there the pleadings stand. I think your Honor knows, irrespective of counsel's statement, that when your Honor has inquired into the question of jurisdiction and ruled, if by chance your ruling should be adverse to Mr. Goldie, thereupon we would have the opportunity to respond to the petition from a factual standpoint.

Mr. Walsh: If your Honor please, I might state at this time that in my own mind, the respondent is in court on his own answer, if your Honor has read it?

The Referee: I have read it, yes.

Mr. Walsh: He has set up an answer to the merits.

Mr. Stark: The scope of the pleading is limited by the prayer. If your Honor will examine the prayer, you will see exactly what is sought.

The Referee: You may proceed to put on the testimony on the question of jurisdiction. [25]

Mr. Walsh: Who is to proceed?

The Referee: It take it you are.

Mr. Glicksberg: Calling Mr. Goldie under Section 2055 of the Code of Civil Procedure.

The Referee: Very well.

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JOSEPH GOLDIE,

called for the Receiver. Sworn.

Mr. Stark: May I make the point, if your Honor please, that Section 2055 is not applicable in this proceeding.

Mr. Glicksberg: If your Honor please, under the new rules I take it it certainly is applicable.

The Referee: If it develops that he is a party to this proceeding.

Mr. Glicksberg: He is a party before the Court.

Mr. Stark: I don't think it is of great importance.

(Testimony of Joseph Goldie.)

The Referee: Very well. Proceed, counsel.

Mr. Glicksberg: Q. Mr. Goldie, where do you reside?

The Witness: A. 2500 Steiner.

Q. What is your occupation? A. Brewer.

Q. Connected with?

A. Rainier Brewing Company.

Q. And how long have you been connected with the Rainier Brewing Company?

A. About 15 years.

Q. And the Rainier Brewing Company at the present time is a corporation duly authorized to do business under the laws of the State of California? A. Yes, sir.

Q. And has its principal place of business in the City and County of San Francisco?

A. Yes, sir.

Q. For the last two years, commencing, at least after September 29, 1937, you were an officer of the corporation? A. Yes, sir.

Q. Prior to September—— [26]

Mr. Stark: Mr. Glicksberg, wasn't it November 1st? No, you are correct.

Mr. Glicksberg: Q. Prior to September 29, 1937, you were also a stockholder of the Pacific Products Corporation? A. Yes.

Q. And Pacific Products Corporation was a corporation duly authorized to do business under the laws of the State of California? A. Yes, sir.

Q. And has its principal place of business in the City and County of San Francisco?



(Testimony of Joseph Goldie.)

A. Yes.

Q. Prior to September 29, 1937, you had certain transactions with Herbert Fleishhacker, did you not? A. Yes, sir.

Q. And on or about September 29, 1937 you entered into a written agreement with Mr. Fleishhacker? A. Yes, sir.

Q. I show you a document here purporting to be an agreement, dated September 29, 1937, and call your attention to the last page thereof and ask you if that is your signature? A. Yes, sir.

Q. Is that the signature of Herbert Fleishhacker? A. I think so, yes, sir.

Q. Well, are you sure? A. Yes.

Q. That was signed in your presence?

A. I think so.

Mr. Glicksberg: I offer it in evidence, if your Honor please.

Mr. Stark: To which I object, if your Honor please, on the ground that it is incompetent, irrelevant and immaterial on the question of jurisdiction and the whereabouts and location of this property on the date of the filing of Mr. Fleishhacker's petition.

The Referee: The objection may be overruled. Admitted strictly on the question of jurisdiction.

#### RECEIVER'S EXHIBIT NO. 1.

[Printer's Note]: Receiver's Exhibit No. 1 will be found set forth at pp. 8 to 12 of this printed transcript of record.

(Testimony of Joseph Goldie.)

Mr. Stark: Pardon me, your Honor, I am under the impression that it is not necessary for me to save exceptions.

The Referee: Isn't there some question as to that under the [27] Ninth Circuit's rulings?

Mr. Stark: There may be some question and I respectfully except to your Honor's ruling.

The Referee: Very well.

Mr. Glicksberg: Q. Mr. Goldie, when you executed Receiver's Exhibit No. 1, you also received a duplicate for your own file, did you not?

The Witness: A. Yes, sir.

Q. Mr. Goldie, have you referred to that agreement recently?

A. I think I have; my attorney has.

Q. You also have referred to it, too, have you not? A. He has the copy; I have not.

Q. Under that agreement Mr. Fleishhacker was entitled to 3,000 shares of Rainier Brewing stock, class A?

Mr. Stark: Just a minute, please. We object to that on the ground that the contract speaks for itself. It is in evidence and an interpretation by Mr. Goldie would serve no useful purpose.

Mr. Glicksberg: No interpretation; I am just asking the witness.

The Referee: I think the objection is good, Mr. Glicksberg.

Mr. Glicksberg: Q. Mr. Goldie, at the time when you executed this agreement, you were the owner of

(Testimony of Joseph Goldie.)

1,924.4 shares of class A, 7 per cent cumulative preferred stock of Pacific Products, Inc.?

The Witness: A. I believe so, yes.

Q. Did you at any time deliver to Herbert Fleishhacker 539 shares of Pacific Products, Inc., a corporation, class A, 7 per cent cumulative stock?

A. No, sir.

Q. As per the terms of this agreement?

A. No, sir.

Q. At no time have you delivered said stock since September 29, 1937, to the present time?

A. No, sir. [28]

Q. Since September 29, 1937, did you deliver any dividends to Mr. Fleishhacker?

A. I believe I did.

Q. And when? A. I haven't the dates.

Mr. Stark: Did you say since?

Mr. Glicksberg: Yes.

Mr. Stark: In order to save the Court's time, I am willing to stipulate that only one delivery of money has been made by Mr. Goldie following the date of the contract, to Mr. Fleishhacker, which delivery was the sum of \$1,800. on September 20, 1938.

Mr. Glicksberg: Q. That sum of \$1,800 was delivered on account of dividends due to Mr. Fleishhacker?

The Witness: A. Yes, sir.

Q. Mr. Goldie, on the 3,000 shares of Rainier Brewing Company class A stock set forth in the agreement you received from the Rainier Corpora-



(Testimony of Joseph Goldie.)

tion on October 21, 1937, \$1.30 per share dividend, did you not?

A. I believe we did. I am not sure, but I think we did.

Q. November 20, 1937, you received a further dividend of 15 cents on the Rainier class A stock?

A. I think so.

Q. September 16, 1938, you received 60 cents a share dividend, which evidently has been paid by this \$1,800 you testified to? A. Yes.

Q. On October 24, 1938, a further dividend was declared and paid by Rainier Brewing Company in the sum of \$1.15? A. Yes.

Q. On each and every one of the class A Rainier shares? A. I think so.

Q. On December 29, 1938, the Rainier Brewing Company further declared an additional dividend of 60 cents, which was payable at the rate of 20 cents per share on the 10th of January, 1939, the 10th of February, 1939, and the 10th of March, 1939? [29]

A. That is correct.

Q. All of those dividends were received by you?

A. Yes.

Q. And all the dividends were also received by you of the 3,000 shares of stock due to Mr. Herbert Fleishhacker? A. Yes.

Q. No payments on dividends have been paid to Herbert Fleishhacker except that \$1,800?

A. That is correct.

(Testimony of Joseph Goldie.)

Mr. Stark: Just a moment, please. We move, your Honor, for the exclusion of the words, "3,000 shares due Herbert Fleishhacker", as assuming something not in evidence and ask that it go out. That is the very controversy.

The Referee: Doesn't the contract provide it?

Mr. Glicksberg: Yes, your Honor, the contract in the first paragraph.

The Referee: The motion will be denied.

Mr. Stark: Exception.

Mr. Glicksberg: Q. Did you at any time between the 29th of September, 1937, and the present date inform Mr. Fleishhacker that you were indebted to Mr. Fleishhacker for the dividends set forth?

The Witness: A. I believe so.

Q. And when was that?

A. I cannot tell you the exact time or date.

Mr. Stark: You mean, pardon me, an oral statement of Mr. Goldie or a written statement?

Mr. Glicksberg: Any form of statement, oral or written.

The Witness: A. Well, we talked about it, yes.

Mr. Glicksberg: Q. And when did you talk about it?

A. I cannot give you the exact date.

Q. Did you ever give Mr. Fleishhacker any written statement? A. Not to my knowledge.

Q. At any time did you tell Mr. Fleishhacker that he was not [30] entitled to these dividends?

(Testimony of Joseph Goldie.)

A. I don't recall making a statement of that kind to him.

Q. Is there any reason why these dividends have not been paid to Mr. Fleishhacker?

A. Yes, there are reasons why.

Q. What is the reason?

A. The reason was that there has been a continual discussion between Mr. Fleishhacker and I as to that contract from the time that we first agreed that I was to deliver to him the security of the Pacific Products, which went out of existence and the bank who held my stock at the time refused to deliver the Pacific Products stock to Mr. Fleishhacker or the 3,000 shares.

Q. May I repeat the question, Mr. Goldie: Did you at any time have any discussion with Mr. Fleishhacker referring to the question of dividends, your failure to make payment?

A. Yes, we talked about it every time a dividend was paid.

Q. You mean you talked to Mr. Fleishhacker about October 21, 1937, about the dividend?

A. I don't remember the date exactly when I talked to him, but I presume every time there was a dividend, we talked to each other about it.

Q. Did you at any time in these conversations tell Mr. Fleishhacker that you were not going to pay those dividends to Mr. Fleishhacker?

A. No, no.



(Testimony of Joseph Goldie.)

Q. Is it not a fact that every time you have affirmed your intention to make these payments to Mr. Fleishhacker?      A. Yes, sir.

Q. Is it not also a matter of fact that you communicated with Mr. Fleishhacker and told him that you were indebted to Mr. Fleishhacker for these various dividend payments to you?

Mr. Stark: Just a minute. Are you referring to a written communication now, Mr. Glicksberg?  
[31]

Mr. Glicksberg: I am asking; that is up to the witness.

The Witness: A. I don't believe there ever was any written communication; it was all verbal.

Q. All verbal?      A. Yes.

Q. Are you positive about it?

A. That is my recollection. I feel that I never corresponded with Mr. Fleishhacker on that. I don't recall any correspondence on the dividends.

Q. Do you recall any conversation had with Mr. Fleishhacker when you gave him this \$1,800 check?

A. I do not.

Q. Do you recall ever writing Mr. Fleishhacker when you gave him this \$1,800 check?

A. No, sir.

Q. Is it then your testimony at the present time that you did not affirm these dividends in writing?

Mr. Stark: Just a moment, please. I submit, if your Honor please, that if Mr. Glicksberg has

(Testimony of Joseph Goldie.)

any writing with regard to this question, *which has* been interrogating the witness on, that the witness is entitled to see this writing.

The Referee: This is cross examination at this time.

Mr. Stark: The rule remains the same, I think, your Honor.

The Referee: No, he has a right to lay the foundation to impeach the witness on cross examination.

Mr. Stark: Do I understand that your Honor overrules the objection?

The Referee: The objection is overruled.

Mr. Stark: May I have an exception?

The Referee: Yes.

Mr. Glicksberg: Will the reporter read the question, please?

(Question read.)

Mr. Stark: You are only required to search your memory, Mr. Goldie. [32]

The Witness: A. I have no recollection whether there was any correspondence. I don't remember it.

Mr. Glicksberg: Q. From your recollection at the present time, Mr. Fleishhacker is entitled to all of the dividends to which you have testified, which total, I think—we can stipulate if Mr. Stark will stipulate, the sum of \$11,400, less the sum of \$1,800 that you have paid him?

Mr. Stark: To that, if your Honor please, we object on the ground that it is an assumption of

(Testimony of Joseph Goldie.)

something not in evidence. It is the very meat of this very controversy and calls for the opinion and conclusion of the witness.

Mr. Glicksberg: I submit, if your Honor please, the witness has testified that these dividends were due to Herbert Fleishhacker and he at no time has denied they were due to Mr. Fleishhacker and he has also testified he has received each and every one of the dividends.

The Referee: Well, isn't that a matter of mathematical conclusion?

Mr. Glicksberg: That is correct.

The Referee: It would be his conclusion if he testified to it.

Mr. Glicksberg: Well, I don't know if it would be a conclusion. We all have to reach a conclusion in mathematics.

The Referee: There is a way of proving that, Mr. Glicksberg. I think the objection is good.

Mr. Glicksberg: Q. Mr. Goldie, is it not a matter of fact that on about the 16th of September, 1938, when you made the payment to Mr. Fleishhacker of \$1,800, that you affirmed in writing all of the prior dividends that were due to Mr. Fleishhacker under the terms of this contract? [33]

The Witness: A. I don't remember that. I don't remember.

Mr. Stark: I am familiar with that letter.

Mr. Glicksberg: Q. I show you here an instru-



(Testimony of Joseph Goldie.)

ment purporting to be a letter dated September 20, 1938, and ask you whether that is signed by you?

Mr. Stark: We will stipulate that is Mr. Goldie's signature.

Mr. Glicksberg: Perhaps the witness would like to refresh his memory, Mr. Stark.

The Witness: A. I remember that now.

Q. Did you send that letter to Mr. Fleishhacker?

A. Yes.

Q. Was that letter sent when you forwarded the \$1,800 check? A. I believe so.

Mr. Glicksberg: We offer it in evidence, if your Honor please.

Mr. Stark: To which, if your Honor please, we object on the ground that it is incompetent, irrelevant, and immaterial. I point out it refers to the existence of a debt between Mr. Goldie and Mr. Fleishhacker and this Court has no jurisdiction to collect accounts receivable due the receiver.

Mr. Glicksberg: Under the law I think counsel is in error, where the debt has been established.

The Referee: What about the Orinoco Mine case? The objection may be overruled.

Mr. Stark: May I have an exception, your Honor?

The Referee: Yes.

(Testimony of Joseph Goldie.)

RECEIVER'S EXHIBIT NO. 2

San Francisco, California

September 20, 1938

Mr. Herbert Fleishhacker,  
No. 1 Sansome Street  
San Francisco, California

Dear H. F.:

Herewith my check for \$1800.00 to cover the 60c per share dividend just paid by Rainier Brewing Company on the 3000 shares of "A" stock due you from me.

I still owe you dividends paid last year on this stock amounting to \$4350.00, less \$1394.94 due me, leaving a balance due you of \$2955.06 which I will pay you at a later date.

Yours very truly,

JOSEPH GOLDIE [66]

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Mr. Glicksberg: Q. Mr. Goldie, referring to Receiver's Exhibit No. 2, I will ask you to state to this Court how you arrived at \$4,350, which you claim under this letter was still due Herbert Fleishhacker as dividends paid for the last year?

The Witness: A. Well, I suppose that was taken off the amount of dividends that had been declared. That is, an amount [34] that is due me which came to \$4,350.

Q. You mean the amount that you had received

(Testimony of Joseph Goldie.)

on these 3,000 shares of stock?      A. Yes, sir.

Q. That amount, for the purpose of calculation, was the dividend of October 21, 1937, at \$1.30 per share, a further dividend of November 20th at 15 cents per share, which would calculate to the \$4,350. that you set forth in the letter that you are indebted to Herbert Fleishhacker?      A. Yes.

Q. Have you any recollection of a further communication with Mr. Herbert Fleishhacker with reference to the other dividends?

A. I have not.

Q. Those dividends that you owed were due to Herbert Fleishhacker and were due in accordance with the terms of that contract?

A. I presume so.

Q. Those were the only rights Mr. Fleishhacker had against you?      A. Yes.

Q. Mr. Goldie, did you at any time, in accordance with the terms of that contract, attempt to deliver to Mr. Fleishhacker the 539 shares of Pacific Products, Inc. class A 7 per cent stock?

A. Well, I signed the contract to have the bank and the bank refused to deliver them.

Q. Where is that contract?

Mr. Stark: Receiver's Exhibit A, Mr. Glicksberg.

Mr. Glicksberg: Q Are you referring to Receiver's Exhibit A as the contract?

The Referee: That is Receiver's Exhibit No. 1.

Mr. Stark: I mean No. 1.



(Testimony of Joseph Goldie.)

Mr. Glicksberg: Q. Is that the contract you are referring to?

The Witness: A. I think it is. That has in it, hasn't it, the Pacific Products? [35]

Mr. Glicksberg: I don't know. I suggest that you read it. I have no objection.

Mr. Stark: Mr. Glicksberg, page 2 of the contract, Receiver's Exhibit No. 1, reads as follows: "Now, therefore, this agreement witnesseth: That the parties hereto", Mr. Fleishhacker and Mr. Goldie, "shall forthwith, and upon the execution of this agreement, cause to be delivered to the transfer agent of Pacific Products, Inc., a corporation, the stock certificate now standing in the name of Joseph Goldie, representing his ownership of 1,924 - 4/10ths shares of Pacific Products, Inc., a corporation, Class A 7 per cent cumulative preferred stock, with directions to said transfer agent and company to split said certificate into one certificate of 539 shares and one certificate of 1,385 - 4/10th shares each of said certificates as split, to be reissued by said company and said transfer agent in the name of Joseph Goldie."

I call your attention to the fact that it becomes an obligation of the parties to the contract to cause that to be issued.

Mr. Glicksberg: That is your interpretation. In other words, when you said "parties" you assumed the word, first party and second party.

Mr. Stark: Mr. Goldie and Mr. Fleishhacker are the only parties to the contract.

(Testimony of Joseph Goldie.)

Mr. Glicksberg: Yes. But there is nothing in this contract that puts the duty upon Mr. Fleishhacker to do anything.

Mr. Stark: There is not?

Mr. Glicksberg: No.

Mr. Glicksberg: Q. Now, Mr. Goldie, are you familiar with this contract?

The Witness: A. Yes, sir.

Q. Or would you like to refresh your memory?  
[36]

A. Well, I would like to refresh my memory. I only read it once, at the time I signed it.

Q. You read it the last time you were in Court?

A. I looked at it. I did not read it all.

Mr. Young: If the Court please, while Mr. Goldie is looking at the contract, I wanted to clear this situation: On several occasions when this proceeding has been before your Honor, the newspaper people have committed quite an error to the effect that this was a proceeding to recover assets from Mr. Fleishhacker. The impression given was that Mr. Fleishhacker had concealed assets and the Court was proceeding to attempt to recover those assets. Counsel will agree with me that there is no such proceeding pending, that it is merely a proceeding against Mr. Goldie and does not concern assets to be recovered.

Mr. Glicksberg: In fact, this asset has been declared by Mr. Fleishhacker.

(Testimony of Joseph Goldie.)

Mr. Young: I hope the newspaper people here will get that clearly in mind at this time. Thank you, your Honor.

The Referee: Very well.

The Referee: Q. Have you read the contract?

The Witness: A. Yes.

Mr. Glicksberg: Q. Now, Mr. Goldie, have you, pursuant to that contract, ever authorized Pacific Products, Inc., a corporation, the transfer agent, to split that certificate of 1,924.4 shares of Pacific Products, Inc. into two certificates?

A. I believe I did.

Q. And when?

A. I cannot tell the exact dates.

Q. Well, approximately when?

A. Just about the time, right after we entered into this agreement.

Q. And to whom did you give this order? [37]

A. Well, I handed it, I believe, to Mr. Fleishhacker. He in turn handed it over to the secretary of Pacific Products, I presume.

Q. Have you a copy of the order?

A. I have not.

Q. Have you any memorandum at all?

A. I have not.

Q. Can you refresh your memory as to the contents of the order?

A. No, sir. I have no recollection, but I remember that when I entered into an agreement with Mr. Fleishhacker that I gave him some sort of a



(Testimony of Joseph Goldie.)

paper to present to the secretary of Pacific Products.

Q. As a matter of fact, Mr. Goldie, may that not be confused with some of your prior dealings with Mr. Fleishhacker?

A. No, no, it is just right in connection with this deal. I don't know whether you are fully aware of the fact that in November, 1937, the Pacific Products was merged.

Q. That is right.

A. You have the record, have you?

Q. That is right. As a matter of fact, the memorandum you refer to was about 1935 or 1936, along in there, before this agreement actually was entered into?

A. The Pacific Products stock I know was cancelled right at the merger.

Q. That is right. All I am asking you, Mr. Goldie, is if you can give us any recollection with reference to this order you testified you purportedly gave Mr. Fleishhacker about the time this contract was executed?

A. I don't remember.

Q. Well, as a matter of fact, you did not give him any order at this time? Any order you had given him was prior to that time, about 1935 or 1936?

A. Possibly so.

Q. And then also as a matter of fact after the contract was executed, you did nothing about attempting to transfer this Pacific Products stock to Mr. Fleishhacker?

(Testimony of Joseph Goldie.)

A. I could not, there was no way of doing it.

[38]

Q. In other words, you know of no way you could do it?      A. No, I did not.

Q. You neither gave any order to Pacific Products transfer agent or any one else to have this stock cancelled and divided into two certificates?

A. I know it could not be done. The bank would not permit it. They held all my Pacific Products stock, which they do up to this day, not Pacific but the Rainier.

Q. You knew it could not be done, therefore you did not attempt to do it?      A. Correct.

Q. Also, you did not attempt to secure for Mr. Fleishhacker 539 shares of Pacific Products class A stock from any other source?

A. It wouldn't have done me no good. How could I?

Q. I don't know. There was additional Pacific Products stock?      A. In my name?

Q. Which you could have purchased?

A. No. There was not a share of Pacific Products at any time I know of that could be purchased.

Q. You did not know where there was sufficient Pacific Products class A stock outstanding other than the stock the bank held on your account?

A. I did not know it if it was.

Q. In other words, you did not hold all the stock of Pacific Products?      A. No, sir.

(Testimony of Joseph Goldie.)

Q. There was a total amount issued of at least five or six times in excess of the amount you had?

A. Just about that. I had about 19 or 20 per cent.

Q. You did not attempt to make any arrangement with the bank to pay off a portion of your obligation to have this stock delivered to Mr. Fleishacker, did you? A. No, sir.

Q. You could not do that, either?

A. No, sir.

Q. In other words, financially you were not in position to [39] do it? A. Correct.

Q. Notwithstanding your obligation under the terms of this contract? A. Yes, sir.

Mr. Glicksberg: No further questions.

The Referee: Cross examine?

Mr. Stark: No cross examination, reserving the right, however, to call Mr. Goldie as my own witness.

The Referee: Very well.

Mr. Glicksberg: The petitioner rests on the question of the jurisdiction.

Petitioner Rests.

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Mr. Stark: Then, Mr. Goldie, you can resume the stand.

### JOSEPH GOLDIE

recalled for the Respondent:

Mr. Stark: I move, your Honor, for an order holding that it is apparent on the face of the record



(Testimony of Joseph Goldie.)

that your Honor has not jurisdiction over Mr. Goldie to determine this controversy between Mr. Goldie and the receiver.

The Referee: The motion is denied.

Mr. Stark: May I have an exception?

The Referee: Granted.

Mr. Stark: Q. Mr. Goldie, at the time of the making of the contract, Receiver's Exhibit No. 1, dated September 29, 1937, who had possession of the 1,924.4 shares of the class A preferred stock of Pacific Products?

Mr. Glicksberg: For the record, if your Honor please, we are going to object to that as entirely incompetent, irrelevant and immaterial and an attempt to vary the terms of a written instrument. The contract itself speaks for itself.

Mr. Stark: The contract does not say that Mr. Goldie had [40] possession of it.

Mr. Glicksberg: We are bound by the terms of the contract. It is an attempt to incorporate in the terms of the contract a prior oral arrangement that may have been had between the parties, which we maintain was subsequently merged in the written instrument.

Mr. Stark: Will your Honor let the reporter read the question back?

The Referee: Proceed.

(Question read.)

(Testimony of Joseph Goldie.)

Mr. Stark: Now, your Honor, the contract does not state that either Mr. Fleishhacker or Mr. Goldie has possession of the stock.

Mr. Glicksberg: That is correct. The point we are making is that it is entirely incompetent, irrelevant and immaterial who has possession of the stock. So far as we are concerned, Mr. Goldie has entered a written instrument to deliver a certain number of shares of stock out of a certificate of 1,924, and has a collateral obligation there to perform and any oral arrangement there may be or any intention of Mr. Goldie which he may have had as to where he would secure that 1,924 shares of stock, we maintain is incompetent, irrelevant and immaterial in view of the written contract.

Mr. Stark: Your Honor, the whereabouts of the stock, not only at the time of the making of the contract, but at the time of the filing of the petition by Mr. Fleishhacker in this proceeding, is in my opinion, and I earnestly urge it, the utter criteria of the very question before your Honor.

The Referee: You mean the possession of the stock or the possession of the money?

Mr. Stark: Either or both.

The Referee: The objection may be sustained as to the possession of the stock. [41]

I suppose you want an exception?

Mr. Stark: Yes, Your Honor.

Mr. Stark: Q. Following the date of this contract, did you receive any word from Mr. Fleish-

(Testimony of Joseph Goldie.)

hacker that he was unable to get the stock of the Pacific Products released from the lien of the pledge of the Anglo Bank?

Mr. Glicksberg: One minute. The same objections, Your Honor, it is incompetent, irrelevant and immaterial and not within the issues of the case and an attempt to incorporate in the terms of the written instrument conversation after the execution of the written instrument.

The Referee: Sustained.

Mr. Stark: Exception. May I make an offer of proof in regard to those two questions, Your Honor?

The Referee: Surely.

Mr. Stark: The purpose of the questions, and the respondent will prove, that on the date of the making of the contract that it is asserted gave rise to these rights, all of the stock of Pacific Products, Inc., owned by Mr. Goldie was pledged to the Anglo Bank and the stock was in the possession of the Anglo Bank on the date of the making of the contract and was also in the possession of the bank subject to the lien of their pledge on the date of the filing of the proceeding in this Court by Mr. Fleishacker. We offer to prove that.

The Referee: Very well.

Mr. Stark: Q. Mr. Goldie, referring to the letter of September 20, 1938, the Receiver's Exhibit No. 2, calling your attention to the second paragraph which states: "I still owe you dividends paid last



(Testimony of Joseph Goldie.)

year on this stock, amounting to \$4,350, less \$1,394.94 due me, leaving a balance due you of \$2,955.06, which I will pay [42] you at a later date."

That figure, \$1,394.94, what does it refer to?

The Witness: A. Money due me from Herbert Fleishhacker.

Q. That is a claimed obligation due from Mr. Fleishhacker at that time? A. Yes, sir.

Q. On the date of the filing of the proceeding in the Court by Mr. Fleishhacker had that money been paid to you by Mr. Fleishhacker? A. No, sir.

Q. Has that money been paid to you by the receiver since the filing of the proceeding?

A. No, sir.

Mr. Stark: That is all from Mr. Goldie.

The Referee: Very well.

#### Cross Examination

Mr. Glicksberg: Q. Mr. Goldie, with reference to this offset of \$1,394.94, what was that due to you from Mr. Fleishhacker for?

A. That was due me in a settlement for some cash money that he owed to the Edward J. Goldie Importation Company, which I took over.

Q. When was this settlement had?

A. That was just part of it and the other was something else. I don't recall, \$275. or \$300. I haven't the other item. This went back as far as 1933 or 1934 that he owed that for.

Q. Mr. Goldie, is it not a matter of fact that the \$1,119.94 of this purported claimed offset of yours

(Testimony of Joseph Goldie.)

was a debt due by Herbert Fleishhacker to the Edward J. Goldie Importation Company?

A. That is just what I said.

Q. And the Edward J. Goldie Importation Company is a corporation, or was a corporation at that time?

A. Yes, sir.

Q. And still is a corporation?

A. No, it went out of business. [43]

Q. When was it dissolved?

A. It went out, I think, in the fall of 1934 or the spring of 1935, I believe. I don't just remember the exact date.

Q. 1934 or 1935?

A. I think it went out in 1935.

Q. Didn't the Edward J. Goldie Importation Company do business still in 1936?

A. No, sir, I don't think so.

Q. Mr. Goldie, I show you this purported statement from the Edward J. Goldie Importation Company to H. F. Fleishhacker, evidencing thereupon certain items of a previous balance.

A. This was a statement, I presume, after they had closed up.

Q. Well, just look at it, Mr. Goldie. Just read it, because I don't want to question you on it and take advantage of you. You notice there considerable purchased made by Herbert Fleishhacker from the Edward J. Goldie Importation Company during the year of 1936?

A. Yes, I notice that.

Q. And you also notice that this statement calls for a total amount of \$1,119.94?

(Testimony of Joseph Goldie.)

A. I know we made a settlement. It was agreed upon that he would pay that at the time that I wrote him that memorandum. When we settled that very memorandum you looked over here, he agreed to it, so did I, that that should be deducted.

Q. Have you any memorandum to that effect in writing? A. Only what you have there.

Q. What?

Mr. Stark: Exhibit 2.

Mr. Glicksberg: Q. This?

The Witness: A. Yes.

Q. Did Mr. Fleishhacker ever sign that?

A. I don't think so.

Mr. Stark: It must be apparent that Mr. Fleishhacker has not [44] placed his name on the document. All you have to do is to look at it.

Mr. Glicksberg: It must be apparent?

Mr. Stark: That his name is not on there. Why ask this witness a ridiculous question like that?

Mr. Glicksberg: Ridiculous questions count. I have a right to, Mr. Stark, under cross examination. The witness can refer to the exhibit.

Mr. Stark: I know these colloquies between counsel are meaningless to you, Your Honor. It must be patent that it is not there.

The Referee: Why continue it, Mr. Stark, when you know it is meaningless?

Mr. Glicksberg: Q. Mr. Goldie, going back to the purported offset which you claim, the \$1,194.94 is an obligation of Herbert Fleishhacker to the Ed-



(Testimony of Joseph Goldie.)

ward J. Goldie Importation Company, a corporation?

The Witness: A. It was an obligation to myself.

Q. Well, have you any assignment of the obligation from the corporation?

A. It is not necessary. It was our business. We owned, it belonged to my family.

Q. That is right, but it still was a corporation?

A. Yes, sir.

Q. At all times it has been conducted as a corporation? A. Yes, sir.

Q. You individually are only one of the stockholders of the corporation?

A. The controlling.

Q. You have control of the corporation, but still you are only one of the stockholders?

A. Yes, sir.

Q. At no time have you had an assignment from the Edward J. [45] Goldie Importation Company of the claim which the Edward J. Goldie Importation Company had against Herbert Fleishhacker?

A. No, sir.

Mr. Glicksberg: No further questions.

### Redirect Examination

Mr. Stark: Wait a minute.

Q. Your son, Edward J. Goldie, was president of the Edward J. Goldie Importation Company?

A. Yes, sir.

(Testimony of Joseph Goldie.)

Q. This obligation of the \$1,119.94 covered sales by the Edward J. Goldie Importation Company to Mr. Fleishhacker?      A. Yes, sir.

Q. And the Edward J. Goldie Importation Company went out of business, did it not?

A. Yes, sir.

Q. Aren't you mistaken about the date it went out of business?

A. Possibly I am. I thought it was much before the time this shows.

Q. I handled the transaction?      A. Yes.

Q. In regard to the sale of the assets of that corporation, did I not?      A. Yes, sir.

Mr. Stark: If I tell you, Mr. Glicksberg, that the transfer of all the physical assets of the Edward J. Goldie Importation Company took place in June of 1936, would you accept that to be the fact?

Mr. Glicksberg: My associate suggests, Mr. Stark, that we have no objections to stipulating to your statement that the corporation went out of business on that particular date. As to what happened to the physical assets, we would not want to stipulate.

Mr. Stark: All right. I simply wanted to clear up the minor feature in the testimony of Mr. Goldie that it went out of business in 1935. It was June, 1936, and I believe the disposition of the [46] assets was to a firm known as the Distillers' Distributing Co.

(Testimony of Joseph Goldie.)

Q. Did you have a discussion with your son, Eddie, the president of the Edward J. Goldie Importation Company, with regard to this \$1,394.94 owing by Mr. Fleishhacker to the Edward J. Goldie Importation Company?

The Witness: A. Yes.

Q. Did you ever discuss the matter of the \$1,394.94 owing from Mr. Fleishhacker to the Goldie Importation Company with Mr. Fleishhacker?

A. On one or two occasions.

Q. What was the substance of the conversation?

Mr. Glicksberg: We object to that on the ground that no proper foundation is laid as to time and place.

The Referee: Lay the foundation, Mr. Stark.

Mr. Stark: I will go a little further.

Q. Do you recall approximately when the one or two conversations took place?

The Witness: A. I do not.

Q. Can you fix it within a year or can you fix it in relation to the date of your letter of September 20, 1938, to Mr. Fleishhacker?

A. It must have been just two or three months prior to that time, that I sent that letter, that I first spoke to him about it.

Q. Where did the conversation take place?

A. In his office in the bank.

Q. What was the conversation?

Mr. Glicksberg: We are going to object to that on the ground that no proper foundation is laid as yet. The witness testified it must have been.



(Testimony of Joseph Goldie.)

Mr. Stark: Q. Give your nearest recollection, Mr. Goldie, as to the date of the conversation? [47]

The Witness: A. I would say two or three months before, Mr. Stark.

Q. September 20, 1938?

A. The date of the letter, yes.

Mr. Stark: Is that satisfactory, to have the date at that time?

Mr. Glicksberg: Go ahead.

Mr. Stark: Q. Now, I will repeat the question, what was the conversation?

The Witness: A. Well, I called his attention to the amount due the Edward J. Goldie Importation Company.

Q. Yes?

A. And on that occasion and one other occasion, just two occasions, I brought that up to him.

Q. What did he say to you, if anything, as to how that would be disposed of?

Mr. Glicksberg: I am going to object to leading and suggestive questions. I don't object to the conversation, but do object to Mr. Stark's leading the witness.

Mr. Stark: All right. Will Your Honor rule?

The Referee: Read the question.

(Question read.)

The Referee: I think it is leading, Mr. Stark. Ask for the conversation.

Mr. Stark: Q. Did you have any conversation on the date you have spoken of or approximately at that time in regard to the \$1,394?

(Testimony of Joseph Goldie.)

The Witness: A. It was agreed with him that I deduct from that——

Mr. Glicksberg: We are going to object to that.

The Witness: A. From that——

Mr. Glicksberg: Wait a minute. [48]

Mr. Stark: Just what you said and he said. The substance.

The Witness: A. He said, "Take that off the dividends".

Mr. Stark: You did not offer this in evidence, did you?

Mr. Glicksberg: No, I will.

Mr. Stark: Will you offer it first?

Mr. Glicksberg: May I offer this in evidence?

RECEIVER'S EXHIBIT No. 3

(Letterhead)

RAINIER BREWING COMPANY, INC.

San Francisco, California

December 31, 1937

Mr. E. Mitchell,  
#1 Sansome Street,  
San Francisco, California,

Dear Eddie:

Enclosed, herewith, is the statement you requested.

Very truly yours,

(Signed) EDWARD GOLDIE

Encl. (1) EM [67]

(Testimony of Joseph Goldie.)

## Statement

EDWARD J. GOLDIE IMPORTATION CO.

560 Ninth Street

San Francisco

UNderhill 4811

H. F. Fleishhacker

#1 Sansome Street,

San Francisco, California,

Detach this portion and

mail with your check

Amount Remitted———

Date 1935	Description	Debit	Credit	Pay Last Amount in This Column
<b>Previous Balance</b>				
Oct.				\$1,134.90
26	Cash		\$350.00	784.90
Nov.				
7	04286	\$40.60		825.50
Dec.				
3	06631	14.32		839.82
14	07625	31.33		871.15
17	07830	42.66		913.81
23	08484	62.67		976.48
24	08518	39.06		
	08693	58.71		1,074.25
1936				
April				
10	Cash		300.00	774.25
13	10810	201.90		
May				
20	11189	143.79		1,119.94

Statement from Edward J. Goldie  
Importation Co.

Paid..... 19..... Check No.....



(Testimony of Joseph Goldie.)

The Referee: That is the statement, for the record, rendered to H. F. Fleishhacker, No. 1 Sansome Street, San Francisco, California.

Mr. Glicksberg: The statement was attached to that letter. We except the portion in writing underneath.

Mr. Stark: You will agree that the portion on the letterhead of the Rainier Brewing Company can go in, won't you?

Mr. Glicksberg: That is correct. The pencil notation is not a part of it.

Mr. Stark: Q. There is a variance in the amount of the statement, \$1,119.94 and the amount referred to in the letter of September 20 as being \$1,394.94, of \$280. Do you know what that \$280 represented?

The Witness: A. That was a cash item. I cannot recall what that was due for, but he admitted it at the time that it was due to me.

Q. Some money he owed you?

A. Money coming to me from him; what for, I cannot recall at this time.

Q. You discussed the matter of the \$1,119.94?

A. Yes.

Q. And the \$280 to make up the total in the letter of September 20?

A. Yes, that is right, that is correct.

Mr. Stark: That is all from Mr. Goldie.

(Testimony of Joseph Goldie.)

Recross Examination

Mr. Glicksberg: Except this further question on recross. [49]

Q. Irrespective of your conversation with Mr. Fleishhacker, at the time you had that conversation with Mr. Fleishhacker, this \$1,119.94 was due to the Edward J. Goldie Importation Company, a corporation?

A. Well, I considered it was due to me.

Q. I appreciate that, but so far as the record?

A. He agreed it was due me, too.

Q. He agreed? A. Yes.

Q. What did he say?

A. Well, the fact that he agreed to have it deducted off the amount. He accepted that letter.

Q. Which letter? Did you pay him anything with reference to the memorandum about the \$4,350? A. Yes, sir.

Q. You did not make a payment on that account? A. I wrote that and he accepted it.

Q. He accepted the letter?

A. It was accepted by him.

Q. At that time you had no title?

A. He agreed absolutely to those figures.

Q. That he owed the Goldie Importation Company \$1,194.94?

A. And was willing to give me the credit for it because he felt it was my money, it was due Joe Goldie.

(Testimony of Joseph Goldie.)

Q. Did you ever give him a bill paid in full from the Edward J. Goldie Importation Company?

A. I don't remember. Chances are I did.

Q. Do you remember whether the Edward J. Goldie Company has ever given him a bill paying the obligation in full?      A. I cannot tell that.

Q. At the time you made the arrangement with Mr. Fleishhacker, Mr. Goldie, the money was due to the corporation?

Mr. Stark: Due to whom?

Mr. Glicksberg: Due to the Goldie Importation Company, a corporation, from Mr. Fleishhacker.

[50]

Mr. Stark: I submit that is absolutely contrary to what the witness testified.

Mr. Glicksberg: We will submit the question.

The Referee: He may answer. It is cross examination.

(Question read.)

The Witness: A. Well, I again state I considered it was due to me.

Mr. Glicksberg: Q. You considered it?

A. Yes, and so did he.

Q. But you never received an assignment from the corporation?      A. No, no.

Q. You never saw to it that the corporation cancelled the obligation of Mr. Fleishhacker?

A. That figure was cancelled on the books.

Q. Well, when?

A. At the time I took it over.



(Testimony of Joseph Goldie.)

Q. Did you cause the obligation to be cancelled?

A. Off the books; I think it was.

Q. Are you certain about it?

A. Pretty sure.

Mr. Stark: You see, Mr. Goldie was not the bookkeeper for the Edward J. Goldie Importation Company. As a matter of fact, I don't think he was an officer of the company.

The Witness: No, no.

Mr. Stark: Although his family and he himself did own all the stock of the company.

The Witness: That is right.

Mr. Glicksberg: No further questions.

(Witness excused.)

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## LEON SLOSS

called for the Respondent, sworn.

Mr. Stark: Q. Where do you reside, Mr. Sloss?  
[51]

A. 2700 Broadway, San Francisco.

Q. You are connected with the Anglo California National Bank? A. Yes.

Q. What is your position there, Mr. Sloss?

A. Vice President.

Q. In charge of what?

A. Collateral loans and keeping of collateral records, things of that nature.

(Testimony of Leon Sloss.)

Q. Has the Anglo California National Bank an account with Mr. Joseph Goldie?

Mr. Glicksberg: I am going to object to that, if Your Honor please, as entirely irrelevant, incompetent and immaterial and not within the issues of this case.

The Referee: What is the materiality?

Mr. Stark: I am going to show, and to save time, if Your Honor please, I will offer to show at this time, that the loan records of the Anglo California National Bank will disclose that since 1933 at least, long prior to the transaction in regard to this contract, that all of the stock issued in Mr. Goldie's name in Pacific Products was on deposit with the Anglo California National Bank in pledge to secure a loan that ranged through a figure of approximately \$165,000, if I remember, down to the present balance of some \$65,000; and, further, at no time has Mr. Goldie has any possession of any of this stock; at no time has Mr. Fleishhacker had possession of this stock. And, following the making of the contract, both Mr. Goldie and Mr. Fleishhacker, pursuant to the terms of it, sought to persuade the bank to release a portion of the Pacific Products stock and consequently a portion of the Rainier Brewing Company A stock in compliance with the conditions of the contract that that be done, and the bank refused to do it. [52]

Mr. Glicksberg: To which attempted introduction we object as entirely incompetent, irrelevant

and immaterial and an attempt to change the terms of a written instrument and it is not an act which is impossible of performance. Under the terms of the contract it is a collateral obligation and we are not concerned with the rights of these parties, whether it might have been a hardship or not on Mr. Goldie to perform. This is this particular contract.

Mr. Stark: I think perhaps, Your Honor, Mr. Glicksberg has misconstrued the purpose of the offer. The contract, if Your Honor will notice, is that the parties to the contract will perform the mechanics in regard to the delivery of the stock to the transfer agent of the company and have it re-issued to split off these shares Mr. Fleishhacker was supposed to get under the contract. I wish to show by this testimony that an effort to do that was made on the part of Mr. Fleishhacker and Mr. Goldie, and the bank refused, being a third party not designated in the contract, to do that act of mechanics.

Mr. Glicksberg: I am going to object, if Your Honor please, on the ground that it is entirely incompetent, irrelevant and immaterial to the issues of the case at the present time. Mr. Stark has twice made the assertion that the use of the word "parties" in the particular contract included both. We maintain it was purely a phraseology of Mr. Stark who drew the instrument. As a matter of fact, Mr. Fleishhacker could do nothing about that so far as the terms of the contract were concerned, if Mr.



Goldie refused to deliver the stock for cancellation or make arrangements with the bank to have it divided in its respective form. Under the particular agreement, Mr. Goldie had the obligation to proceed to have the stock divided in two certificates and have one issued to Mr. Fleishhacker as collateral. The mere fact that he had [53] financial obligations which made it financially difficult for Mr. Goldie to do, certainly cannot warrant an attempt to vary the terms of this written instrument; neither can they bring in attempts of the parties other than based on the four corners of that document.

The Referee: Do I understand this, Mr. Stark, this condition was prevailing so far as the bank is concerned at the time the contract was drawn?

Mr. Stark: The situation was this, Your Honor: At the time the contract was drawn and many years before that the stock holdings of Mr. Goldie had been pledged to the Anglo California National Bank. The contract was made, and no one knows more about the contract than I do. The contract was made on the statement of Mr. Fleishhacker that he would be able to get a release of a portion of that stock from the pledge.

The Referee: But, was that incorporated in the contract?

Mr. Stark: Yes, Your Honor.

Mr. Glicksberg: We submit, if Your Honor please, we would like counsel to show us that in the contract.

The Referee: Point it out, Mr. Stark.

Mr. Stark: I read it to you once.

The Referee: I would like to hear it again.

Mr. Stark: In the first place the contract is signed by Mr. Goldie and Mr. Fleishhacker. Page 2, the first paragraph of the charging clause of the contract, following the "Witnesseth" provides:

"That the parties hereto", p-a-r-t-i-e-s; not "party"; not Mr. Goldie or not Mr. Fleishhacker alone, but the two of them acting jointly together,

"Shall forthwith, upon the execution of this agreement, cause to be delivered to the transfer agent of Pacific Products, Inc., [54] a corporation, the stock certificate"

Nowhere did the contract say the parties should, because the parties knew the stock was pledged to the Anglo Bank.

Mr. Glicksberg: If Your Honor please, we are going to object to Mr. Stark's making any statement in the record of any intention of the parties that cannot be gathered from the four corners of the instrument. He knows legally that we cannot introduce any intention other than the Court can determine from the written instrument itself. If Mr. Stark, when he drew the instrument, had a different intention, he should have placed it in this instrument to protect his client. He has not done so and I submit that Mr. Goldie is bound by the terms of the instrument as it appears in Court today.

The Referee: That is the very reason why I

wanted to know if this was known to the parties at the time the contract was drawn.

Mr. Stark: Indeed it was.

The Referee: Then the offer may be denied and the objection sustained.

Mr. Stark: That is on the point of my offer of proof?

The Referee: Yes.

Mr. Stark: That it was the duty of both parties to perform the mechanics of splitting this stock off.

The Referee: Yes.

Mr. Stark: May I have an exception, Your Honor?

The Referee: Yes.

Mr. Stark: That is all.

(Witness excused.)

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Mr. Stark: Mr. Thompson. [55]

HARRY T. THOMPSON,

called for the Respondent, sworn.

Mr. Stark: Q. Mr. Thompson, what is your business or avocation?

A. Well, I am an employee of the Anglo California National Bank.

Q. Have you a special employment of some kind? Have you acted as a special employee?

A. I am acting as secretary for Mr. Fleish-hacker, with the approval of the bank.



(Testimony of Harry T. Thompson.)

Q. That is, for Mr. Herbert Fleishhacker?

A. That is right.

Q. How long have you acted as such?

A. About 20 years.

Q. Continuously?                   A. Yes.

Q. Mr. Thompson, do you know of your own knowledge whether or not Mr. Fleishhacker ever made any effort to get any portion of the stock of the Pacific Products Company, standing in the name of Mr. Goldie on pledge with the bank, released from the pledge?                   A. I do——

Mr. Glicksberg: One minute. We are going to object to that as entirely incompetent, irrelevant and immaterial, and an attempt to vary the terms of a written instrument.

The Referee: I suppose he is entitled to this preliminary answer. The objection is overruled on the preliminary question and answer.

(Question read.)

The Referee: Answer that yes or no.

The Witness: A. No.

Mr. Stark: Q. You don't know whether or not an effort was made?                   A. I do not.

Q. Have you ever discussed with Mr. Fleishhacker as to whether or not he approached the bank in regard to releasing stock from the [56] pledge?

Mr. Glicksberg: We are going to object to that, if Your Honor please, as entirely incompetent, irrelevant and immaterial, certainly a self-serving

(Testimony of Harry T. Thompson.)

declaration, an attempt to secure a self-serving declaration.

Mr. Stark: I submit it, Your Honor.

The Referee: Well, particularly on the ground that it is incompetent and irrelevant, I will sustain the objection, because I think it would be purely hearsay at this time, at this state of the proceeding.

Mr. Stark: Q. Do you know anything about an item of \$1,394.93, that is referred to in this letter of September 20, 1938, Receiver's Exhibit No. 2?

The Witness: A. I am familiar with the letter. I know that it was deducted.

Q. Do you know whether or not it was deducted as a conclusion to conversations that were had between parties? A. My recollection is yes.

Q. I am not asking you for the substance of the conversation, but the parties had conferred in regard to the time and the exhibit with that \$1,394.94 item referred to was the fruition of those conversations? A. That is my recollection.

Mr. Stark: That is all, Mr. Thompson.

#### Cross Examination

Mr. Glicksberg: Just a minute, Mr. Thompson.

Q. From your own records, Mr. Fleishhacker was indebted to the Edward J. Goldie Importation Company for \$1,119.94 of that amount. Is that correct? A. That is right.

Q. When you testified that it was deducted, what did you mean?

(Testimony of Harry T. Thompson.)

A. Deducted from the dividend due Mr. Fleishhacker on the [57] 3,000 shares.

Q. Has Mr. Fleishhacker received any dividends other than that \$1,800?

A. Not to my knowledge.

Q. You mean to say it was deducted on your records?

A. Well, I don't know whether I had any record of it or not except the written correspondence.

Q. Then it was not deducted from any place. It was considered an obligation of Herbert Fleishhacker to the Edward J. Goldie Importation Company?

A. The letter speaks for itself.

Q. Then it was an obligation of Mr. Fleishhacker to the Edward J. Goldie Importation Company?

A. That is right.

Mr. Glicksberg: That is all.

#### Redirect Examination

Mr. Stark: Q. Mr. Thompson, the subject matter of this contract had been a matter of conversation between the parties over a period of years prior to taking form?

A. I understand——

Mr. Glicksberg: I am going to object to that as entirely incompetent, irrelevant and immaterial.

Mr. Stark: Don't answer too hurriedly.

The Referee: It may go out.

Mr. Glicksberg: As entirely incompetent, irrelevant and immaterial and an attempt to vary the terms of a written instrument.



(Testimony of Harry T. Thompson.)

The Referee: Yes, if it was prior to the making of the written instrument, the California Code Section takes care of that, Mr. Stark, and the objection is sustained.

Mr. Stark: May I have an exception, Your Honor?

The Referee: Yes.

Mr. Stark: Q. Was there any money paid by Mr. Goldie over to Mr. Fleishhacker by way of dividends on the 3,000 shares of Rainier Brewing Company A stock prior to the making of that contract? [58]

Mr. Glicksberg: We are going to object to that, Your Honor, as entirely immaterial, not within the issues before this Court at the present time.

The Referee: It may be sustained.

Mr. Stark: May I have an exception, Your Honor?

The Referee: Yes. That is made strictly on the proposition that there is a Code Section that covers all negotiations and matters that happened prior to the making of the contract.

Mr. Stark: That have been reduced to writing.

The Referee: And merged in the contract.

Mr. Stark: Unless there exists an ambiguity in the writing.

The Referee: In the event there is, I think the only question that can be raised would be a question of fraud.

(Testimony of Harry T. Thompson.)

Mr. Stark: Of course, we are making no such point as that; simply a failure of the parties to meet from the standpoint of minds.

The Referee: If there is an ambiguity of the contract, you can give testimony interpreting the contract.

Mr. Stark: Yes.

The Referee: But you cannot, as I understand, go back and incorporate in the contract by interpretation something that transpired prior to the making of the contract.

Mr. Stark: We contend no ambiguity exists. Counsel for the receiver is the one who is contending for the ambiguity.

Mr. Glicksberg: Oh, no, we are satisfied with the agreement.

The Referee: If there is no ambiguity, then strictly the objection is sustainable.

Mr. Stark: All right. Thank you very much, Mr. Thompson.

(Witness excused.)

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Mr. Stark: We rest on the jurisdictional question, Your Honor. [59]

I would like an opportunity to file some points and authorities with Your Honor.

The Referee: Very well. Suppose I continue the whole matter until Friday with the understanding that all briefs will be in.

Mr. Stark: Next Friday?

The Referee: Yes. I don't want to drag it along. You should be pretty well ready with all your points and authorities.

Mr. Stark: I have them collected. It is a matter of having them put on paper.

The Referee: Why not put it in letter form. I don't care for much argument; I don't go much on attorneys' argument. I take the cases myself and try to supply some that counsel have not found.

Mr. Stark: Yes. I think probably I could have it in by next Friday. I am under the gun in a matter in San Rafael.

The Referee: I don't want to put you in any spot. Suppose I give you until next Friday to put yours in and then to the following Friday, May 5, to put theirs in.

Mr. Stark: And then will the matter stand submitted?

The Referee: Yes, on two briefs, unless you want to answer, Mr. Stark, strictly on the jurisdictional point.

Mr. Stark: I understand, Your Honor, in fixing the time now, I am probably entitled to answer on the merits if you should rule adversely on the jurisdictional point.

The Referee: There is no question about that, Mr. Stark. I understand you will have two briefs?

Mr. Stark: That is satisfactory to me.

The Referee: Yours to be in by next Friday, just a letter written to them and to me. They can do



the same way and I would like theirs in not later than the day before, Thursday. [60]

Mr. Walsh: If Your Honor please, we have already introduced the photostatic copy of the agreement and we would like at this time to substitute the photostatic copy already in evidence in this proceeding and to take back the original.

Mr. Stark: That is quite satisfactory. As a matter of fact, I know it was stipulated that the copy of the document attached to the original petition, pursuant to which the order to show cause was issued, constitutes a true copy of the contract.

Mr. Walsh: That is satisfactory.

The Referee: Very well, with that understanding the attorney for the receiver is receiving back Receiver's Exhibit No. 1. The matter then stands over, this particular matter stands over to May 5, 1939, at 10 o'clock.

(Adjourned to May 5, 1939, at 10 A. M.)

[Endorsed]: Filed Apr. 26, 1939. [61]

[Title of District Court and Cause.]

Friday, May 19, 1939

(Re: Joseph Goldie)

Appearances:

Sterling Carr, Esq., Receiver;

Francis P. Walsh, Esq., and Louis J. Glicks-  
berg, Esq., Attorneys for the Receiver;

Charles M. Stark, Esq., Attorney for Joseph  
Goldie. [62]

Mr. Stark: May I interrupt, Your Honor? I have a matter on the calendar. We represent the respondent Joseph Goldie.

As I understand the decision of the Circuit Court of Appeals in the case of Pearson v. Higgins, which we defended in the Circuit Court of Appeals, the respondent in this case has an alternative right: He may stand silent and have an order made against him adjudicating the merits of the controversy; or, he may go to the merits and appeal or review, Your Honor, from the final decision.

We are of the opinion that the defense we have made to the summary jurisdiction of the forum here is sound, and therefore, we elect to stand mute, of course, not waiving any rights that we have in regard to the merits of the controversy, and let Your Honor take such action as you see fit in regard to it.

The Referee: I have in mind something else, Mr. Stark. Isn't there a decision holding that after a

petition for review is filed, the referee has no power over the matter?

Mr. Stark: I am not prepared to say.

The Referee: I think there is.

Mr. Stark: That is ipso facto a supersedeas?

The Referee: That is my understanding.

Mr. Stark: Possibly, that is so. However, Your Honor will recall *Pearson v. Higgins* in 24 A.B.R., New Supplement, I think at page 16, where the Circuit Court of Appeals for the Ninth Circuit held this: That where an order has been made by the referee asserting that he had jurisdiction to determine the merits of the controversy and an appeal or a review from the order has been timely taken—the Circuit Court of Appeals says that for all the petitioner knew, when the merits were heard, he might win his case and therefore he would not be injured by the adoption of that forum [63] of summary jurisdiction and they sent that case back to be tried on the merits and in the decision they said that the respondent had an election of two manners of procedure: He might stand silent and have an order on the merits made against him or might go to the merits and review the final order bringing up both the jurisdictional point and the meritorious point if he desired.

The Referee: I am going to follow my own ideas on that regardless of what the Circuit Court of Appeals said. My idea is that I haven't any more power over that order until the petition for review is passed upon. That is what I am going to do about it.



Mr. Stark: Of course, that gives us no concern one way or the other.

The Referee: It does not give me any concern. I just announced what I am going to do.

Mr. Stark: Then as I take it, there will be no order made on the merits in the matter.

The Referee: I am not going further in the matter until that is determined.

Mr. Stark: Only so far as you have already determined.

The Referee: I have made an order, you have taken a review. Until that is passed on, nothing is going to be done.

Mr. Stark: Very well.

Mr. Walsh: If Your Honor please, in order to protect the record of the receiver at this time I am going to make a motion that the default of Mr. Joseph Goldie be entered for failing to comply with the order of the court directing him to answer.

The Referee: The motion will be denied because that will be taken care of when the matter is ruled on. [64]

Mr. Stark: That would be quite contrary to what Your Honor just stated as your viewpoint.

The Referee: In other words, I take it that if my position is ruled upon, that is, if the court sustains me in my position, the default is there, not having followed out the order of the court.

Mr. Walsh: I am merely protecting the record.

The Referee: Very well.

[Endorsed]: Filed Apr. 26, 1939.[65]

[Title of District Court and Cause.]

OPINION, FINDINGS, CONCLUSIONS AND  
ORDER ON OBJECTION TO COURT'S  
JURISDICTION TO PROCEED SUMMAR-  
ILY

There is but one question before the court at this time, that is, has this court the right to proceed summarily against the respondent, Joseph Goldie, who has challenged the Court's jurisdiction so to do?

In passing upon said question, the only record which the court is entitled to have before it is that presented by the verified petition of the receiver, the order to show cause directed against Joseph Goldie, the latter's written objection to the court's jurisdiction, and the evidence on the hearing relative to the question of jurisdiction, and not otherwise.

Based upon such record, and more particularly upon the written objection of said respondent, Joseph Goldie, and said evidence, the court finds the following facts:

1. That by reason of the form and substance of his written objection to the court's jurisdiction, the respondent, Joseph Goldie, has waived, and did waive, the objection to jurisdiction and now is before the court by a general appearance, and for all purposes;

2. That by calling the witnesses, Leon Sloss, Jr., and Harry T. Thompson, and subjecting them to oral examination on behalf of said respondent, said respondent, Joseph Goldie, has waived, and did

waive, the objection to jurisdiction and now is before the court for all purposes;

3. That said respondent, Joseph Goldie, at the time of the filing of the petition by the debtor herein, and also at the time of the filing of said petition by said receiver, was, and now is acting as a trustee of said debtor, and [69]

4. That said respondent, Joseph Goldie, at the time of the filing of the petition by the said debtor, and also at the time of the filing of said petition by said receiver, was, and now is, indebted to the debtor, but that the court, without waiving the right so to do at a later date, at this time, in passing upon the question of jurisdiction, does not undertake to pass upon the amount of said indebtedness.

Upon the facts as found herein, the court concludes as matters of law:

1. That both by his written objection to the jurisdiction and by calling the aforesaid witnesses, the respondent, Joseph Goldie, has appeared herein generally and made a response to the receiver's said petition upon the merits;

2. That the receiver is entitled to proceed summarily herein against said respondent, Joseph Goldie, a trustee of said debtor;

3. That said respondent, Joseph Goldie, is entitled to a reasonable time within which to file a further response, upon the merits, to the receiver's petition and order to show cause, and

4. That to the end that the matter may be fully presented upon the merits, said respondent, Joseph



Goldie, is entitled to the process of this court to have produced such further competent evidence as he may be desirous of offering, whether said evidence is sought to be given by witnesses orally, or by documentary evidence, not including affidavits.

It is therefore hereby ordered, adjudged and decreed that the objection of the respondent, Joseph Goldie, to the jurisdiction of this court to proceed summarily upon the receiver's petition and order to show cause be, and it is, overruled, that the said respondent be given five days [70] from this date within which to make further response, upon the merits, to said petition and order to show cause, if he be so advised, and that the hearing upon said petition and order to show cause, upon the merits, be, and said hearing is, fixed for the 19th day of May, 1939, at the hour of 10 o'clock A. M.

Dated: May 5th, 1939.

BURTON J. WYMAN,

Referee in Bankruptcy.

[Endorsed]: Filed May 5, 1939. [71]

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[Title of District Court and Cause.]

PETITION TO REVIEW ORDER  
OF REFEREE

The petition of Joseph Goldie respectfully shows:

That in the course of the proceedings herein, to-wit, on the 5th day of May, 1939, an order was made by the Referee overruling the plea of your

petitioner objecting to the summary jurisdiction of the court, which order is designated "Opinion, Findings, Conclusions and Order on Objection to Court's Jurisdiction to Proceed Summarily", a copy of which is hereto annexed and marked Exhibit "A". [72]

### I.

That such order was and is erroneous in that said order purports to hold that by reason of the form and substance of the written objection of your petitioner to the court's summary jurisdiction your petitioner has waived and did waive the objection to the jurisdiction of the court and was before the court by a general appearance and for all purposes; whereas, your petitioner, in his verified return required to be filed by him, appeared specially and not otherwise for the sole purpose of objecting to the summary jurisdiction of the court and moving said court for an order quashing the service of the order to show cause made upon him and, in his return to the order to show cause issued by the referee, set forth therein the facts sustaining his plea objecting to the jurisdiction of said court.

### II.

That said order of the referee was and is erroneous in that the Referee has purportedly held that by reason of your petitioner calling witnesses and submitting them to oral examination on his behalf said petitioner has waived and did waive the objection to the jurisdiction of the court and is now be-

fore the court for all purposes; whereas, your petitioner was required, by reason of the order to show cause issued by the Referee, to call witnesses in order to support the facts set forth in his return and offer proof of the transactions had upon which he based his claim as an adverse claimant and to sustain his plea objecting to the summary jurisdiction of the Referee to hear or determine the adverse claim of your petitioner.

### III.

That said order was and is erroneous in that the said Referee has attempted to make a finding and did make a finding upon the merits of the controversy between your petitioner and the Receiver in that said order finds as a matter of fact that [73] your petitioner was and now is acting as a trustee of Herbert Fleishhacker, the debtor in the above entitled proceedings.

### IV.

That said order was and is erroneous in that the said Referee has attempted to make a finding and did make a finding upon the merits of the controversy between your petitioner and the Receiver in that said order finds as a matter of fact that your petitioner was and now is indebted to the debtor, Herbert Fleishhacker.

### V.

That said order of the Referee was and is erroneous in that said findings of fact that your petitioner was and is a trustee and was and is a debtor



of said Herbert Fleishhacker did attempt to finally adjudge that your petitioner has become liable to said Receiver as such trustee and as such debtor, and has denied to your petitioner the right to have the issues as to whether or not your petitioner was and is a trustee of said debtor or was and is indebted to said debtor tried in a plenary proceeding as demanded by said petitioner.

## VI.

That said order of the Referee was and is erroneous in that the said Referee concludes as a matter of law that by reason of said findings made by him over the objection of your petitioner appearing specially that your petitioner has appeared generally and made response to the Receiver's petition upon the merits and that said Receiver is entitled to proceed summarily herein against your petitioner as a trustee of Herbert Fleishhacker, the debtor herein.

## VII.

That said order of the Referee was and is erroneous in that while said order purports to allow your petitioner a right to plead upon the merits and proposes that he subject himself to [74] the summary jurisdiction of the Referee, while in truth and in fact said order has attempted to finally adjudge the issues summarily over the objection of your petitioner, excepting the Referee has reserved a right to determine the amount of the alleged indebtedness by your petitioner to said debtor and his said Receiver.

## VIII.

That said order was and is erroneous in that upon a further hearing before said Referee, pursuant to his asserted summary jurisdiction, said petitioner will be precluded from the right as a matter of law to present any evidence upon the issues as to whether or not he is or was acting as a trustee for said debtor and whether or not he is or was indebted to said debtor at the time of the commencement of said proceedings or at the time of the filing of the petition for an order to show cause by the Receiver.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that same may be reviewed by a judge of this court as provided in the Acts of Congress relating to bankruptcy.

JOSEPH GOLDIE,

Petitioner.

TORREGANO & STARK

By CHARLES M. STARK,

Attorneys for Petitioner. [75]

United States of America,  
Northern District of California,  
City and County of San Francisco—ss.

Joseph Goldie, being first duly sworn, deposes and says:

That he is the petitioner named and described in the foregoing Petition to Review; that he has read said Petition, knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

JOSEPH GOLDIE.

Subscribed and sworn to before me this 11th day of May, 1939.

[Seal]                      LOUIS WIENER,  
Notary Public in and for the City and County of  
San Francisco, State of California.

(Service of copy admitted.)

[Endorsed]: Filed May 12, 1939. [76]

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[Exhibit "A," hereto attached, is identical with "Opinion, Findings, Conclusions and Order on Objection to Court's Jurisdiction to Proceed Summarily" set out at pages 76 to 78 of this printed record.] [77]

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[Title of District Court and Cause.]

CERTIFICATE AND REPORT OF REFEREE  
ON PETITION FOR REVIEW OF ORDER  
OF REFEREE ON OBJECTION OF  
JOSEPH GOLDIE TO COURT'S JURIS-  
DICTION TO PROCEED SUMMARILY

To Honorable A. F. St. Sure, United States District  
Judge for the Northern District of California:

I, Burton J. Wyman, one of the referees in bankruptcy of this court and the referee in charge of this proceeding respectfully certify and report:

On the 3rd day of April, 1939, the following verified petition for summary order directed to Joseph



Goldie to turn over to receiver certain securities and moneys belonging to debtor was filed herein: [78]

“The petition of Sterling Carr respectfully represents:

“I.

“That ever since the 26th day of January, 1939, petitioner has been and now is the duly and regularly appointed, qualified and acting Receiver for the estate of Herbert Fleishhacker, the above named Debtor;

“II.

“That at all of the times herein mentioned, Rainier Brewing Company, Inc., was and now is a corporation incorporated, organized and existing under and by virtue of the laws of the State of California, duly authorized to do business, and doing business, in said State, and with its principal place of business in the City and County of San Francisco, in said State;

“That the capital stock of said corporation is divided into shares of Class “A” common stock and Class “B” common stock;

“III.

“That at all of the times herein mentioned, Pacific Products, Inc. was and now is a corporation incorporated, organized and existing under and by virtue of the laws of the State of California, duly authorized to do business, and doing business, in said State, and with its prin-

incipal place of business in the City and County of San Francisco, in said State;

“IV.

“That upon the 29th day of September, 1937, Herbert Fleishhacker, the Debtor herein, and Joseph Goldie made and entered into a written agreement, a copy of which is hereunto annexed, marked ‘Petitioner’s Exhibit A’ [79] and made a part hereof, as fully as if set forth in full herein;

“V.

“That amongst the assets of said Debtor delivered to your Receiver were certain claims of said Debtor against the said Joseph Goldie in accordance with the terms and provisions of said agreement, a copy of which is hereunto annexed;

“VI.

“That in accordance with the terms of said agreement, said Joseph Goldie agreed, within a period of two years from September 29, 1937, to deliver to said Herbert Fleishhacker three thousand (3000) shares of the Class ‘A’ common stock of said Rainier Brewing Company, Inc., and further agreed, as collateral for the performance of the terms of the aforementioned agreement to deliver to the said Herbert Fleishhacker, five hundred thirty-nine (539) shares of Class ‘A’ Cumulative Preferred stock of Pacific Products, Inc., immediately after the execution of said agreement;

## “VII.

“That in accordance with the terms of said agreement, said Joseph Goldie further agreed to deliver to Herbert Fleishhacker, said Debtor, any and all dividends received by the said Goldie declared on and after the 29th day of September, 1937, upon said 3,000 shares of the Class ‘A’ common stock of Rainier Brewing Company, Inc.

## “VIII.

“Petitioner further alleges that the said Joseph Goldie at all of the times herein mentioned, up to and including the 23d day of November, 1938, has failed and [80] refused to deliver to the said Herbert Fleishhacker said 539 shares of Pacific Products, Inc., Class ‘A’ 7% Cumulative Preferred stock as collateral under the terms of said agreement;

“That the said Goldie has also failed to deliver to the said Herbert Fleishhacker any or all of the dividends that the said Goldie has received since September 29, 1937, upon said 3,000 shares of Class ‘A’ common stock of Rainier Brewing Company, Inc., save and except the sum of eighteen hundred (1800) dollars which was paid on the 20th day of September, 1938;

## “IX.

“That petitioner further alleges that the following dividends have been declared by said Rainier Brewing Company, Inc., on Class ‘A’



common stock, the proceeds of which have been received by the said Joseph Goldie, to-wit:

October	21, 1937—	\$1.30 per share
November	20, 1937—	.15 per share
Sept.	16, 1938—	.60 per share
October	24, 1938—	1.15 per share
December	29, 1938—	.60 per share

Payable as follows:

January	10, 1939—	20c per share
February	10, 1939—	20c per share
March	10, 1939—	20c per share

“Petitioner alleges that the said Joseph Goldie, on and after the 29th day of September, 1937, and up to the present date, has received the total sum of \$11,400.00 on said 3,000 shares of common stock of Rainier Brewing Company, Inc., as dividends, and which dividends, under the terms of said agreement herein referred to, were agreed to be paid by the said Goldie to the said Herbert Fleishhacker; that no part of said sum has been paid to [81] the said Herbert Fleishhacker save and except said sum of \$1,800.00; that there is now due and payable to the said Herbert Fleishhacker, Debtor herein, and to Sterling Carr, Receiver for the estate of said Debtor, the sum of nine thousand six hundred & 00/100 (9,600) dollars;

“X.

“Your petitioner further alleges that demand has been made upon the said Joseph

Goldie by your petitioner as Receiver for the estate of Herbert Fleishhacker, Debtor, for the delivery to said Receiver of said 539 shares of Pacific Products, Inc., to be held by said Receiver as collateral under the terms of said agreement, and for the sum of \$9,600. due the said Herbert Fleishhacker in accordance with the terms of said agreement; that at all of the times herein referred to, the said Joseph Goldie has failed and refused and still fails and refuses, without right or cause, to deliver to your petitioner the said 539 shares of Pacific Products, Inc., or said sum of \$9,600.00 or any part thereof;

“XI.

“That in accordance with the terms of said agreement, a copy of which is attached hereto and marked ‘Exhibit A’, the said Herbert Fleishhacker, Debtor herein, at all of the times herein mentioned was and now is entitled to delivery to him of said 539 shares of Pacific Products, Inc.; that the said Joseph Goldie is now holding said 539 shares in trust for the said Herbert Fleishhacker; [82]

“That since the execution of said agreement the said Joseph Goldie has received the total sum of \$11,400.00 as dividends on said 3000 shares of Class ‘A’ common stock of Rainier Brewing Company, Inc.; that by the terms of said agreement, the said Herbert Fleishhacker is entitled to receive said sum, but that no part

thereof has been paid to said Herbert Fleishacker save and except said sum of \$1,800.00, and that said Joseph Goldie is now holding the balance of said dividends, to-wit, the sum of \$9,600.00, in trust for the said Herbert Fleishacker, the Debtor above named;

“Wherefore, petitioner prays:

“(1) That this Court issue its order directed to the said Joseph Goldie, to show cause, if any he has, upon a date certain, to be fixed by this Court, why he should not be ordered, compelled and required to turn over and deliver to petitioner as such Receiver, 539 shares of Class ‘A’ 7% Cumulative Preferred stock of Pacific Products, Inc. in accordance with the terms of said agreement specifically set forth in said Petitioner’s Exhibit ‘A’ attached hereto, together with dividends aggregating the sum of \$9,600.00 due petitioner as such Receiver in accordance with the provisions of said agreement;

“(2) And for such further and additional relief as this Court shall deem proper.

“STERLING CARR,

“Receiver for the Estate  
of Herbert Fleish-  
hacker, Debtor.

Petitioner.

“Francis P. Walsh,

“Louis J. Glicksberg,

“Attorneys for Petitioner.”

[Verification omitted for sake of brevity.] [83]



Attached to said petition as petitioner's Exhibit "A" and referred to in said petition, was and is a copy of the following agreement:

"Whereas, Joseph Goldie is obligated to Herbert Fleishhacker entitling the said Herbert Fleishhacker to receive from the said Joseph Goldie, 3,000 shares of the Rainier Brewing Company, Inc., a corporation, Class 'A' common stock; and

"Whereas, the said Joseph Goldie desires to assure the said Herbert Fleishhacker of the ultimate payment of said obligation for the delivery of said 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class 'A' common stock; and

"Whereas, Pacific Products, Inc., a corporation, is the owner of 59,622 shares of the Class 'A' common stock of the Rainier Brewing Company, Inc., a corporation, and 258,092 shares of the Class 'B' common stock of the Rainier Brewing Company, Inc., a corporation; and

"Whereas, Joseph Goldie is the owner of 1924-4/10ths shares of the Class 'A' 7% Cumulative Preferred stock of Pacific Products, Inc., a corporation; and

"Whereas, it is the desire of the parties hereto that the said Joseph Goldie pledge to Herbert Fleishhacker so much of the Class 'A' 7% Cumulative Preferred stock of Pacific Products, Inc., a corporation, owned by him as will secure to the said Herbert Fleishhacker the ulti-

mate delivery to him by said Joseph Goldie of 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class 'A' common stock.

“Now therefore, this Agreement,

“Witnesseth:

“That the parties hereto shall forthwith upon the execution of this agreement cause to be delivered to the [84] transfer agent of Pacific Products, Inc., a corporation, the stock certificate now standing in the name of Joseph Goldie, representing his ownership of 1,924-4/10ths shares of Pacific Products, Inc., a corporation, Class 'A' 7% Cumulative Preferred stock, with directions to said transfer agent and company to split said certificate into one certificate of 539 shares and one certificate of 1,385-4/10ths shares, each of said certificates as split to be reissued by said company and said transfer agent in the name of Joseph Goldie.

“It is further mutually agreed and understood between the parties hereto that said certificate representing 539 shares of Pacific Products, Inc., a corporation, Class 'A' 7% Cumulative Preferred stock, shall be forthwith by said Joseph Goldie endorsed and delivered to said Herbert Fleishhacker, and shall thenceforth be held in pledge by said Herbert Fleishhacker, subject however to the following express agreements.

“That the said Joseph Goldie may at any time within two years from the date of this

agreement acquire and deliver to the said Herbert Fleishhacker 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class 'A' common stock, and upon delivery of such stock of Rainier Brewing Company, Inc., a corporation, the said Pacific Products, Inc., a corporation, stock hereby pledged shall be forthwith returned to the said Joseph Goldie by the said Herbert Fleishhacker, and the said obligation of each of the parties hereto shall thereby stand discharged in full.

“It is further expressly agreed and understood that the said Joseph Goldie may at any time within two years of the date of this agreement pay in lawful money of the United States of America to the said Herbert Fleishhacker, [85] the equivalent of the market value at the time of said payment of 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class 'A' common stock, and shall thereupon be entitled to the return of the stock of the Pacific Products, Inc., a corporation, hereinabove provided to be pledged to the said Herbert Fleishhacker, and thereupon the obligation of the parties hereto, each to the other, shall stand discharged in full.

“It is further expressly agreed and understood that Joseph Goldie may at any time within two years of the date of this agreement pay to the said Herbert Fleishhacker in lawful money of the United States of America, the



equivalent of the market value at the time of said payment of not less than 750 shares of Rainier Brewing Company, Inc., a corporation, Class 'A' common stock, and shall thereupon be entitled to the return of 25% of the Pacific Products, Inc., a corporation, stock hereby pledged to the said Herbert Fleishhacker, and upon each successive payment of not less than 25%, or the delivery of not less than 750 shares of Rainier Brewing Company, Inc., a corporation, Class 'A' common stock to the said Herbert Fleishhacker, shall forthwith be entitled to the return of an additional 25% of the said stock hereby pledged to the said Herbert Fleishhacker, until such time as the full amount of said 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class 'A' common stock, has been delivered to the said Herbert Fleishhacker, or the full amount of the value of the said 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class 'A' common stock has been paid to the said Herbert Fleishhacker.

“It is further expressly understood and agreed that [86] Joseph Goldie may at his option at any time within two years from the date of this agreement, sell, transfer or set over absolutely to the said Herbert Fleishhacker 450 shares of Pacific Products, Inc., a corporation, Class 'A' 7% Cumulative Preferred stock, and upon such transfer of said 450 shares to the said Herbert Fleishhacker the obligation of the par-

ties hereto, one to the other, shall stand discharged in full.

“It is further expressly understood and agreed that during the life of this agreement any dividends declared and paid by the said Pacific Products, Inc., a corporation, on the said shares of stock hereby deposited with the said Herbert Fleishhacker, which dividends are paid from funds acquired by the said Pacific Products, Inc., from any source other than from moneys paid to it as dividends on stock owned by it of Rainier Brewing Company, Inc., a corporation, shall not be payable to the said Herbert Fleishhacker but shall constitute dividends payable to the said Joseph Goldie.

“It is further expressly understood and agreed that during the life of this agreement that as to all dividends declared and paid by the Rainier Brewing Company, Inc., a corporation, to Pacific Products, Inc., a corporation, which in turn give rise to payments of dividends by the Pacific Products, Inc., a corporation, to its stockholders, the said Herbert Fleishhacker shall receive such portion of such dividends as would be paid to him were he the owner of 3,000 shares of Rainier Brewing Company, Inc., a corporation, Class ‘A’ common stock.

“It is further expressly understood and agreed that the provisions of the within agreement embrace the entire agreement on the sub-

ject matter between the parties hereto, [87] and cancels, supersedes and replaces all prior and other agreements, and the benefits and obligations herein set forth flowing to and from each of the parties hereto shall inure to and be binding upon the heirs, administrators and assigns of the parties hereto.

“In witness whereof, we have hereunto set our hands and seals this 29th day of September, 1937.

“(Signed) JOSEPH GOLDIE

“(Signed) HERBERT FLEISHHACKER

(See the original of said petition, with said Exhibit attached, handed up herewith as a part of this certificate and report.)

Based upon said petition, the following order to show cause was issued on said April 3, 1939:

“Sterling Carr, Receiver for the estate of Herbert Fleishhacker, the Debtor above named, having filed herein his petition praying for an order directed to Joseph Goldie, to show cause why he should not be compelled and required to turn over and deliver to said Receiver 539 shares of Class ‘A’ 7% Cumulative Preferred stock of Pacific Products, Inc., a corporation, in accordance with the provisions of a certain agreement specifically set forth in said petition, together with dividends in the sum of \$9,600.00 due petitioner as such Receiver in accordance with the terms of said agreement; and



“Good cause appearing therefor, it is hereby ordered that said Joseph Goldie show cause, if any he has, before the undersigned Referee in Bankruptcy at his courtroom, Room 609 Grant Building, 1095 Market Street, San Francisco, California, on the 14th day of April, 1939, at the hour of 10 A.M., why said petition of said Receiver should not be granted; and [88]

“It is further ordered that a copy of this order to show cause, together with a copy of said petition, be served upon the said Joseph Goldie at least 5 days before the return date hereof.

“Dated: April 3, 1939.

BURTON J. WYMAN,  
Referee in Bankruptcy.”

(See original of said order to show cause, handed up herewith as a part of this certificate and report.)

Thereafter, and on the 13th day of April, 1939, the following verified “plea” of respondent, Joseph Goldie, was filed herein:

“Now comes Joseph Goldie, of the City and County of San Francisco, State and District aforesaid, respondent to an order to show cause issued by the above entitled court on the 3d day of April, 1939, and returnable on the 14th day of April, 1939, and appearing specially and not otherwise for the purpose of objecting to the summary jurisdiction of the above entitled

court and moving said court for an order quashing the service of said order to show cause, and for grounds of his plea objecting to the jurisdiction of the above entitled court alleges:

“1. That it affirmatively appears from the petition of the receiver, Sterling Carr, upon which said order to show cause was issued by the above entitled court, that the above entitled court was and is without jurisdiction to hear and determine the matters therein stated or to make any order against the respondent therein named except by consent of this respondent, and that this respondent has never consented [89] to submit himself to the jurisdiction of the above entitled court but, on the contrary, this respondent has declined and does decline to submit himself to the jurisdiction of the above entitled court to hear and determine any of the matters set forth in said receiver’s petition or be subjected to any orders of the above entitled court pertaining to any of the matters set forth in said receiver’s petition.

“2. That it affirmatively appears from the face of said receiver’s petition and the order to show cause issued by the above entitled court, that the facts stated in said receiver’s petition do not confer upon the above entitled court summary jurisdiction over said respondent without his consent.

“3. That it affirmatively appears from said receiver’s petition, upon which said order to

show cause was issued, and from said order to show cause, that the issues which the receiver seeks to submit to the above entitled court as grounds for the granting of the prayer of said petition can only be determined in a plenary action and not in a summary proceeding instituted by said receiver herein, and it affirmatively appears from said petition that no summary jurisdiction can be exercised by the above entitled court as it relates to this respondent without the consent of this respondent.

“That this respondent is entitled to have said issue determined in a plenary action and to have a trial by jury of the issues raised in said petition pursuant to his demand.

“For a further, separate and distinct objection to the summary jurisdiction of the above entitled court, [90] this respondent alleges as follows, to-wit:

“That at the time of the making of the contract, a copy of which is attached to the petition of the receiver herein, the property referred to in said contract as constituting one thousand nine hundred twenty-four and four-tenths (1,924 4/10) shares of the preferred stock of Pacific Products, Inc., a corporation, Class ‘A’ Cumulative 7%, was not in the possession of respondent, Joseph Goldie, nor in the possession of Herbert Fleishhacker, but, on the contrary, said stock, and each and every share thereof, had been theretofore pledged by re-



spondent to the Anglo California National Bank to secure the repayment by respondent of a sum of money owing by respondent to said Anglo California National Bank, aggregating at the time of the making of said contract the sum of One Hundred Thirty-six Thousand Six Hundred Thirty-eight and 62/100 Dollars (\$136,638.62);

“That said stock, and each and every share thereof, was held by said Anglo California National Bank as security for the repayment by respondent of the sum of money hereinabove set forth;

“That at the time of the making of said contract, it was agreed that Herbert Fleishhacker and respondent would obtain a release by said Anglo California National Bank of so much of said stock as was agreed in said contract would be deposited with the said Herbert Fleishhacker, to-wit, five hundred thirty-nine (539) shares;

“That at no time prior to the making of said contract or at the time of the making thereof was the respondent the owner of any shares of Rainier Brewing Company, Inc., a corporation, Class ‘A’ Common Stock, but all of the [91] interest of said respondent in said Rainier Brewing Company, Inc., a corporation, was represented by respondent’s ownership, subject to the pledge to the Anglo California National Bank, as aforesaid, of the one thousand nine

hundred twenty-four and four-tenths (1,924-4/10) shares of the Pacific Products, Inc., a corporation, Class 'A' 7% Cumulative Preferred stock referred to in said contract, and at no time was it within the terms of the agreement between respondent and said Herbert Fleishhacker that both the five hundred thirty-nine (539) shares of Pacific Products, Inc., a corporation, Class 'A' 7% Cumulative Preferred stock, and three thousand (3,000) shares of Rainier Brewing Company, Inc., a corporation, Class 'A' Common stock, would be delivered to Herbert Fleishhacker in pledge.

“Respondent further alleges that at the time of the making of said agreement, it was being discussed amongst the owners of all of the corporate stock of the Pacific Products, Inc., a corporation, that the assets of the Rainier Brewing Company, Inc., a corporation, would be transferred to Pacific Products, Inc., a corporation, and, thereupon, the name of the Pacific Products, Inc., a corporation, would be changed to that of the Rainier Brewing Company, Inc., a corporation, and that the Rainier Brewing Company, Inc., a corporation, then in existence at the time of the making of said contract would be dissolved, and upon the happening of said events respondent would have been in a position to deposit with the said Herbert Fleishhacker three thousand (3,000) shares of Rainier Brewing Company, Inc., a

corporation, Class 'A' Common stock, if and when said [92] three thousand (3,000) shares were released from the pledge of the Anglo California National Bank;

“That respondent was informed by Herbert Fleishhacker that if respondent would give to him an agreement pledging three thousand (3,000) shares of Rainier Brewing Company, Inc., Class 'A' Common stock, when the reorganization above referred to was accomplished he, the said Herbert Fleishhacker, would be able to get released from the pledge of the Anglo California National Bank said three thousand (3,000) shares of Rainier Brewing Company, Inc., a corporation, Class 'A' Common stock.

“That thereafter, and on or about November 30th, 1937, all of the corporate assets of the Rainier Brewing Company, Inc., a corporation, were transferred to Pacific Products, Inc., a corporation, and the name of the Pacific Products, Inc., a corporation, was changed to Rainier Brewing Company, Inc., a corporation. The Anglo California National Bank delivered to the transfer agent all of the stock in the Pacific Products, Inc., a corporation, owned by respondent. Said stock was cancelled and there was re-issued in the name of respondent the number of shares necessary to represent respondent's new ownership in the Rainier Brewing Company, Inc., formerly known as Pacific



Products, Inc., a corporation, whereupon, respondent and Herbert Fleishhacker requested the Anglo California National Bank to deliver to the said Herbert Fleishhacker three thousand (3,000) shares of Rainier Brewing Company, Inc., Class 'A' Common stock, which the said Anglo California National Bank refused to do.

“That the one thousand nine hundred twenty-four and four-tenths (1,924  $\frac{4}{10}$ ) shares of Pacific Products, Inc., a corporation, Class 'A' 7% Cumulative Preferred [93] stock referred to in said agreement between respondent and the said Herbert Fleishhacker were cancelled and became worthless.

“That upon the refusal of said Anglo California National Bank to deliver to Herbert Fleishhacker three thousand (3,000) shares of the Rainier Brewing Company stock referred to hereinabove, the agreement of September 29, 1937, became inoperative and of no force and effect;

“That it became necessary, by reason of said inability of the parties to carry out the terms of said agreement that a new agreement be made, in the meantime of which respondent made certain payments of money to Herbert Fleishhacker, aggregating the sum of One Thousand Eight Hundred Dollars (\$1,800.00).

“That at no time since the making of said

contract referred to herein have any shares of Rainier Brewing Company, Inc., a corporation, Class 'A' Common stock, either of the old company or of the new company, or any of the stock of the Pacific Products, Inc., a corporation, referred to in said contract, been in the possession, actual or constructive, of respondent or Herbert Fleishhacker, or of the Receiver of the estate herein, but, on the contrary, at all times said stock, and each and every share thereof has been and now is in the possession of the Anglo California National Bank and is subject to the terms of a contract of pledge between respondent and said Anglo California National Bank.

“Respondent alleges that any order granting the prayer of the receiver herein would be in excess of the jurisdiction of the above entitled court and that it would be a physical impossibility to comply with any order of [94] this court relative to Pacific Products, Inc., a corporation, stock, as said stock is no longer in existence; that any order against respondent in relation to Rainier Brewing Company stock formerly known as Pacific Products, Inc., a corporation, would be impossible to comply with as the possession, both actual and constructive, of each and every share of said stock is in the Anglo California National Bank, subject to the terms of the pledge by respondent.

“That a true controversy exists between respondent and the estate herein as to what obli-

gation, if any, respondent has to the said estate.

“Wherefore, respondent prays that service of the order to show cause issued by the above entitled court may be ordered quashed on account of lack of jurisdiction of the above entitled court to have issued said order to show cause.

JOSEPH GOLDIE

Respondent.”

[Verification omitted for sake of brevity.]

(See original of said “plea”, handed up herewith as a part of this certificate and report.)

When the aforesaid petition, order to show cause based thereon, and the “plea” thereto, came on for hearing, Francis P. Walsh, Esq., and Louis J. Glicksberg, Esq., appeared on behalf of the receiver herein, C. M. Stark, Esq., of Messrs. Torregano & Stark, appeared on behalf of the respondent, Joseph Goldie, and Harry S. Young, Esq., appeared on behalf of the debtor.

At the commencement of said hearing, the following statements and comments were made: [95]

“Mr. Stark: In that matter, if the Court please, Mr. Goldie has filed a verified plea to the jurisdiction of this Court to hear and determine any controversy between Mr. Carr and himself, and as I understand the procedure, Your Honor is required as a matter of law to



make inquiry into the foundation and basis of the attack on the jurisdiction of the Bankruptcy Court and to rule thereon; whereupon, as I recall the holding in the case of Pierson vs. Higgins, with which Your Honor no doubt is familiar, it will become the duty of the receiver to establish the factual matters of his petition that would entitle him to any relief under his prayer and that the respondent, Mr. Goldie, would have the opportunity to present the factual matters that would tend to deny to the petitioner the relief sought under his prayer. I also understand it to be the law that where the respondent has filed a verified plea to the jurisdiction of this Court, that it becomes the duty of the receiver to establish the existence of jurisdiction. There is no presumption of the jurisdiction by the simple filing of the petition.

“Mr. Walsh: If Your Honor please, in reply to that contention, I might state that the receiver has met the presumption by his pleadings and when the plea to the jurisdiction is raised, the burden is upon the respondent to show at this time that this Court has no jurisdiction to go ahead in this matter. In other words, as the cases hold, the Court has the right to try out the entire matter on the plea to the jurisdiction and if the evidence shows that the contention of the respondent is not meritorious or his right as against the receiver is colorable,

then the Court is bound to go ahead and has the jurisdiction. In other words, we have alleged this matter in our pleading and have attached to the pleading a copy of the agreement, to which there has been no meritorious defense—to that petition. I might state, if Your Honor please, that we have set forth in our petition [96] that Mr. Goldie, under this contract, owes Mr. Fleishhacker, the debtor, or the receiver now, the sum of money now due from dividends which were paid on stock of the Rainier Brewing Company. Now, I will point out to Your Honor there is absolutely no issue raised in this answer on the plea to the jurisdiction or in the plea on the merits, which is set forth in this answer, raising any issue as to the payment of these dividends.

“Mr. Stark: Of course, I cannot, as Your Honor well knows, attack the jurisdiction of Your Honor and in the same breath ask for anything affirmative. The scope of my pleading was to assert that no jurisdiction existed in this Court to determine any matters in regard to Mr. Goldie and there the pleadings stand. I think Your Honor knows, irrespective of counsel’s statement, that when Your Honor has inquired into the question of jurisdiction and ruled, if by chance your ruling should be adverse to Mr. Goldie, thereupon we would have the opportunity to respond to the petition from a factual standpoint.

“Mr. Walsh: If Your Honor please, I might state at this time that in my own mind, the respondent is in Court on his own answer, if Your Honor has read it?

“The Referee: I have read it, yes.

“Mr. Walsh: He has set up an answer to the merits.

“Mr. Stark: The scope of the pleading is limited by the prayer. If Your Honor will examine the prayer, you will see exactly what is sought.

“The Referee: You may proceed to put on the testimony on the question of jurisdiction.”

(See reporter's transcript on hearing on objection to jurisdiction (Joseph Goldie) which is handed up herewith as a part of this certificate and report.)

Thereafter, in substance, the following evidence was offered and received: [97]

As Testified To By Joseph Goldie, the Respondent, As a Witness For The Receiver Under Section 2055, California Code of Civil Procedure:

I reside at 2500 Steiner; my occupation is brewer; I have been connected with the Rainier Brewing Company about 15 years; the Rainier Brewing Company at the present time is a corporation duly authorized to do business under the laws of the State of California, and has its principal place of business in the City and County of San Francisco; for the last two years, commencing, at least



after September 29, 1937, I was an officer of the corporation; prior to September 29, 1937, I was also a stockholder of the Pacific Products Corporation which was duly authorized to do business under the laws of the State of California, and had its principal place of business in the City and County of San Francisco.

Prior to September 29, 1937, I had certain transactions with Herbert Fleishhacker, and on or about September 29, 1937, I entered into a written agreement with Mr. Fleishhacker; that is my signature on the document which you show me purporting to be an agreement, dated September 29, 1937, and that is the signature of Herbert Fleishhacker which I think was signed in my presence.

“Mr. Glicksberg: I offer it in evidence, if Your Honor please.

“Mr. Stark: To which I object, if Your Honor please, on the ground that it is incompetent, irrelevant and immaterial on the question of jurisdiction and the whereabouts and location of this property on the date of the filing of Mr. Fleishhacker’s petition.

“The Referee: The objection may be overruled. Admitted strictly on the question of jurisdiction. Receiver’s Exhibit No. 1.

“Mr. Stark: Pardon me, Your Honor, I am under the impression that it is not necessary for me to save exceptions.

“The Referee: Isn’t there some question as to that under the Ninth Circuit’s rulings?

“Mr. Stark: There may be some question and I respectfully except to Your Honor’s ruling.

“The Referee: Very well.”

(See reporter’s transcript hereinbefore referred to, pages 5 and 6 thereof, handed up as a part of this certificate and report.) [98]

When I executed Receiver’s Exhibit No. 1, I also received a duplicate for my own file; I think I have referred to that agreement recently, my attorney has; he has the copy; I have not; I believe, at the time when I executed this agreement, I was the owner of 1,924.4 shares of Class A 7 per cent cumulative preferred stock of Pacific Products, Inc. I did not at any time deliver to Herbert Fleishhacker 539 shares of Pacific Products, Inc., a corporation, class A, 7 per cent cumulative stock as per the terms of this agreement; at no time have I delivered said stock since September 29, 1937, to the present time.

I believe I did deliver dividends to Mr. Fleishhacker since September 29, 1937; I haven’t the dates.

“Mr. Stark: In order to save the Court’s time, I am willing to stipulate that only one delivery of money has been made by Mr. Goldie following the date of the contract, to Mr. Fleishhacker, which delivery was the sum of \$1,800 on September 20, 1938.

“Mr. Glicksberg: Q. That sum of \$1,800 was delivered on account of dividends due to Mr. Fleishhacker?

“The Witness: A. Yes, sir.”

(See reporter’s transcript hereinbefore referred to, page 7 thereof.)

On the 3,000 shares of Rainier Brewing Company class A stock set forth in the agreement, I believe we did receive from the Rainier Corporation on October 21, 1937, \$1.30 per share dividend, I am not sure, but I think we did; I think I received a further dividend on November 20, 1937, of 15 per cent on the Rainier class A stock; September 16, 1938, I received 60 cents a share dividend, which evidently has been paid by this \$1,800 I testified to; on October 24, 1938, a further dividend was declared and paid by Rainier Brewing Company in the sum of \$1.15 on each and every one of the class A Rainier shares, I think; On December 29, 1938, the Rainier Brewing Company further declared an additional dividend of 60 cents, which was payable at the rate of 20 cents per share on the 10th of January, 1939, the 10th of February, 1939, and the 10th of March, 1939; all of those dividends [99] were received by me of the 3,000 shares of stock due to Mr. Herbert Fleishhacker; no payments on dividends have been paid to Herbert Fleishhacker except that \$1,800.

“Mr. Stark: Just a moment, please. We move, Your Honor for the exclusion of the words, ‘3,000 shares due Herbert Fleishhacker’, as assuming something not in evidence and ask that it go out. That is the very controversy.

“The Referee: Doesn’t the contract provide it?



“Mr. Glicksberg: Yes, Your Honor, the contract in the first paragraph.

“The Referee: The motion will be denied.

“Mr. Stark: Exception.”

(See reporter's transcript, page 8 thereof.)

I believe that between the 29th of September, 1937, and the present date I informed Mr. Fleishhacker that I was indebted to him for the dividends set forth; I cannot tell you the exact time or date; to my knowledge I never gave Mr. Fleishhacker any written statement; I don't recall making any statement at any time to Mr. Fleishhacker that he was not entitled to these dividends; there are reasons why these dividends have not been paid to Mr. Fleishhacker; the reason was that there has been a continual discussion between Mr. Fleishhacker and I as to that contract from the time that we first agreed that I was to deliver to him the security of the Pacific Products, which went out of existence and the bank who held my stock at the time refused to deliver the Pacific Products stock to Mr. Fleishhacker or the 3,000 shares; every time a dividend was paid we talked about the question of dividends; my failure to make payment; I don't remember the date exactly when I talked to him, but I presume that every time there was a dividend we talked to each other about it; at no time in these conversations did I tell Mr. Fleishhacker that I was not going to pay those dividends to him; it is a fact that every time I have affirmed my intention to make those payments to Mr. Fleishhacker. [100]

“Q. Is it not also a matter of fact that you communicated with Mr. Fleishhacker and told him that you were indebted to Mr. Fleishhacker for these various dividend payments to you?

“Mr. Stark: Just a minute. Are you referring to a written communication now, Mr. Glicksberg?

“Mr. Glicksberg: I am asking; that is up to the witness.

“The Witness: A. I don’t believe there ever was any written communication; it was all verbal.

“Q. All verbal? A. Yes.

“Q. Are you positive about it?

“A. That is my recollection. I feel that I never corresponded with Mr. Fleishhacker on that. I don’t recall any correspondence on the dividends.

“Q. Do you recall any conversation had with Mr. Fleishhacker when you gave him this \$1,800 check? A. I do not.

“Q. Do you recall ever writing Mr. Fleishhacker when you gave him this \$1,800 check?

“A. No, sir.

“Q. Is it then your testimony at the present time that you did not affirm these dividends in writing?

“Mr. Stark: Just a moment, please. I submit, if Your Honor please, that if Mr. Glicksberg has any writing with regard to this question, which he has been interrogating the wit-

ness on, that the witness is entitled to see this writing.

“The Referee: This is cross examination at this time.

“Mr. Stark: The rule remains the same, I think, Your Honor.

“The Referee: No, he has a right to lay the foundation to impeach the witness on cross examination.

“Mr. Stark: Do I understand that Your Honor overrules the objection?

“The Referee: The objection is overruled.

“Mr. Stark: May I have an exception?

“The Referee: Yes.”

(See reporter's transcript, pages 9 and 10 thereof.) [101]

I don't remember that about the 16th of September, 1938, when I made the payment to Mr. Fleishacker of \$1,800, that I affirmed in writing all of the prior dividends that were due to Mr. Fleishacker under the terms of this contract.

“Mr. Stark: I am familiar with that letter.

“Mr. Glicksberg: Q. I show you here an instrument purporting to be a letter dated September 20, 1938, and ask you whether that is signed by you?

“Mr. Stark: We will stipulate that is Mr. Goldie's signature.

“Mr. Glicksberg: Perhaps the witness would like to refresh his memory, Mr. Stark.

“The Witness: A. I remember that now.



“Q. Did you send that letter to Mr. Fleishhacker? A. Yes.

“Q. Was that letter sent when you forwarded the \$1,800 check?

“A. I believe so.

“Mr. Glicksberg: We offer it in evidence, if Your Honor please.

“Mr. Stark: To which, if Your Honor please, we object on the ground that it is incompetent, irrelevant, and immaterial. I point out it refers to the existence of a debt between Mr. Goldie and Mr. Fleishhacker and this Court has no jurisdiction to collect accounts receivable due the receiver.

“Mr. Glicksberg: Under the law I think counsel is in error, where the debt has been established.

“The Referee: What about the Orinoco Mine case? The objection may be overruled.

“Mr. Stark: May I have an exception, Your Honor?

“The Referee: Yes. Receiver’s Exhibit No. 2.”

(See reporter’s transcript, page 12 thereof.)

Referring to Receiver’s Exhibit No. 2, my answer as to how I arrived at \$4,350, which I claim under this letter was still due Herbert Fleishhacker as dividends paid for the last year, I suppose that was taken off the amount of dividends that had been declared, that is, an amount that is due me which came to \$4,350; I mean the [102] amount that I had

received on these 3,000 shares of stock; that amount, for the purpose of calculation, was the dividend of October 21, 1937, at \$1.30 per share, a further dividend of November 20th at 15 cents per share, which would calculate to the \$4,350 that I set forth in the letter that I was indebted to Herbert Fleishhacker; I have no recollection of a further communication with Mr. Herbert Fleishhacker with reference to the other dividends; I presume that those dividends that I owed were due to Herbert Fleishhacker and were due in accordance with the terms of that contract; those were the only rights Mr. Fleishhacker had against me.

I signed the contract to have the bank deliver to Mr. Fleishhacker the 539 shares of Pacific Products, Inc. class A 7 per cent stock and the bank refused to deliver them, the contract being Receiver's Exhibit No. 1.

“Mr. Stark: Mr. Glicksberg, page 2 of the contract, Receiver's Exhibit No. 1, reads as follows: ‘Now, therefore, this agreement witnesseth: That the parties hereto’, Mr. Fleishhacker and Mr. Goldie, ‘shall forthwith upon the execution of this agreement, cause to be delivered to the transfer agent of Pacific Products, Inc., a corporation, the stock certificate now standing in the name of Joseph Goldie, representing his ownership of 1,924 - 4/10ths shares of Pacific Products, Inc., a corporation, Class A 7 per cent cumulative preferred stock, with directions to said transfer agent and company to split said certificate into one certificate

of 539 shares and one certificate of 1,385 - 4/10ths shares each of said certificates as split, to be reissued by said company and said transfer agent in the name of Joseph Goldie.'

"I call your attention to the fact that it becomes an obligation of the parties to the contract to cause that to be issued.

"Mr. Glicksberg: That is your interpretation. In other words, when you said 'parties' you assumed the word, first party and second party.

"Mr. Stark: Mr. Goldie and Mr. Fleishhacker are the only parties to the contract.

[103]

"Mr. Glicksberg: Yes. But there is nothing in this contract that puts the duty upon Mr. Fleishhacker to do anything.

"Mr. Stark: There is not?

"Mr. Glicksberg: No.

"Mr. Glicksberg: Q. Now, Mr. Goldie, are you familiar with this contract?

"The Witness: A. Yes, sir.

"Q. Or would you like to refresh your memory?

"A. Well, I would like to refresh my memory. I only read it once, at the time I signed it.

"Q. You read it the last time you were in Court?

"A. I looked at it. I did not read it all.

\* \* \* \* \*



“The Referee: Q. Have you read the contract?

“The Witness: A. Yes.

“Mr. Glicksberg: Q. Now, Mr. Goldie, have you, pursuant to that contract, ever authorized Pacific Products, Inc., a corporation, the transfer agent, to split that certificate of 1,924.4 shares of Pacific Products, Inc. into two certificates?

“A. I believe I did.

“Q. And when?

“A. I cannot tell the exact dates.

“Q. Well, approximately when?

“A. Just about the time, right after we entered into this agreement.

“Q. And to whom did you give this order?

“A. Well, I handed it, I believe, to Mr. Fleishhacker. He in turn handed it over to the secretary of Pacific Products, I presume.

“Q. Have you a copy of the order?

“A. I have not.

“Q. Have you any memorandum at all?

“A. I have not.

“Q. Can you refresh your memory as to the contents of the order?

“A. No, sir. I have no recollection, but I remember when I entered into an agreement with Mr. Fleishhacker that I gave him some sort of a paper to present to the secretary of Pacific Products. [104]

“Q. As a matter of fact, Mr. Goldie, may that not be confused with some of your prior dealings with Mr. Fleishhacker?

“A. No, no, it is just right in connection with this deal. I don’t know whether you are fully aware of the fact that in November, 1937, the Pacific Products was merged.

“Q. That is right.

“A. You have the record, have you?

“Q. That is right. As a matter of fact, the memorandum you refer to was about 1935 or 1936, along in there, before this agreement actually was entered into?

“A. The Pacific Products stock I know was cancelled right at the merger.

“Q. That is right. All I am asking you, Mr. Goldie, is if you can give us any recollection with reference to this order you testified you purportedly gave Mr. Fleishhacker about the time this contract was executed?

“A. I don’t remember.

“Q. Well, as a matter of fact, you did not give him any order at this time? Any order you had given him was prior to that time, about 1935 or 1936?           A. Possibly so.

“Q. And then also as a matter of fact after the contract was executed, you did nothing about attempting to transfer this Pacific Products stock to Mr. Fleishhacker?

“A. I could not. There was no way of doing it.

“Q. In other words, you knew of no way you could do it?

“A. No, I did not.

“Q. You neither gave any order to Pacific Products transfer agent or any one else to have this stock cancelled and divided into two certificates?

“A. I knew it could not be done. The bank would not permit it. They held all my Pacific Products stock, which they do up to this day, not Pacific but the Rainier.

“Q. You knew it could not be done, therefore you did not attempt to do it?

“A. Correct.

“Q. Also, you did not attempt to secure for Mr. Fleishhacker 539 shares of Pacific Products class A stock from any other source?

“A. It wouldn't have done me no good. How could I? [105]

“Q. I don't know. There was additional Pacific Products stock?

“A. In my name?

“Q. Which you could have purchased?

“A. No. There was not a share of Pacific Products at any time I know of that could be purchased.

“Q. You did not know where there was sufficient Pacific Products class A stock outstanding other than the stock the bank held on your account?

“A. I did not know it if it was.



“Q. In other words, you did not hold all the stock of Pacific Products?

“A. No, sir.

“Q. There was a total amount issued of at least five or six times in excess of the amount you had?

“A. Just about that. I had about 19 or 20 per cent.

“Q. You did not attempt to make any arrangement with the bank to pay off a portion of your obligation to have this stock delivered to Mr. Fleishhacker, did you?

“A. No, sir.

“Q. You could not do that, either?

“A. No, sir.

“Q. In other words, financially you were not in position to do it?           A. Correct.

“Q. Notwithstanding your obligation under the terms of this contract?           A. Yes, sir.

“Mr. Glicksberg: No further questions.

“The Referee: Cross examine?

“Mr. Stark: No cross examination, reserving the right, however, to call Mr. Goldie as my own witness.

“The Referee: Very well.

“Mr. Glicksberg: The petitioner rests on the question of the jurisdiction.

“Petitioner rests.

“Mr. Stark: Then, Mr. Goldie, you can resume the stand.

JOSEPH GOLDIE. [106]

Recalled for the Respondent;

“Mr. Stark: I move, your Honor, for an order holding that it is apparent on the face of the record that your Honor has not jurisdiction over Mr. Goldie to determine this controversy between Mr. Goldie and the receiver.

“The Referee: The motion is denied.

“Mr. Stark: May I have an exception?

“The Referee: Granted.

“Mr. Stark: Q. Mr. Goldie, at the time of the making of the contract, Receiver's Exhibit No. 1, dated September 29, 1937, who had possession of the 1,924.4 shares of the class A preferred stock of Pacific Products?

“Mr. Glicksberg: For the record, if your Honor please, we are going to object to that as entirely incompetent, irrelevant and immaterial and an attempt to vary the terms of a written instrument. The contract itself speaks for itself.

“Mr. Stark: The contract does not say that Mr. Goldie had possession of it.

“Mr. Glicksberg: We are bound by the terms of the contract. It is an attempt to incorporate in the terms of the contract a prior oral arrangement that may have been had between the

parties, which we maintain was subsequently merged in the written instrument.

“Mr. Stark: Will your Honor let the reporter read the question back?

“The Referee: Proceed.

“(Question read.)

“Mr. Stark: Now, your Honor, the contract does not state that either Mr. Fleishhacker or Mr. Goldie has possession of the stock.

“Mr. Glicksberg: That is correct. The point we are making is that it is entirely incompetent, irrelevant and immaterial who has possession of the stock. So far as we are concerned, Mr. Goldie has entered a written instrument to deliver a certain number of shares of stock out of a certificate of 1,924 and has a collateral [107] obligation there to perform and any oral arrangement there may be or any intention of Mr. Goldie which he may have had as to where he would secure that 1,924 shares of stock, we maintain is incompetent, irrelevant and immaterial in view of the written contract.

“Mr. Stark: Your Honor, the whereabouts of the stock, not only at the time of the making of the contract, but at the time of the filing of the petition by Mr. Fleishhacker in this proceeding, is in my opinion, and I earnestly urge it, the utter criteria of the very question before your Honor.



“The Referee: You mean the possession of the stock or the possession of the money?”

“Mr. Stark: Either or both.

“The Referee: The objection may be sustained as to the possession of the stock.

“I suppose you want an exception?”

“Mr. Stark: Yes, your Honor.

“Mr. Stark: Q. Following the date of this contract, did you receive any word from Mr. Fleishhacker that he was unable to get the stock of the Pacific Products released from the lien of the pledge of the Anglo Bank?”

“Mr. Glicksberg: One minute. The same objection, your Honor, it is incompetent, irrelevant and immaterial and not within the issues of the case and an attempt to incorporate in the terms of the written instrument conversation after the execution of the written instrument.

“The Referee: Sustained.

“Mr. Stark: Exception. May I make an offer of proof in regard to those two questions, your Honor?”

“The Referee: Surely.

“Mr. Stark: The purpose of the questions, and the respondent will prove, that on the date of the making of the contract that it is asserted gave rise to these rights, all of the stock of Pacific Products, Inc. owned by Mr. Goldie was pledged to the Anglo [108] Bank and the stock

was in the possession of the Anglo Bank on the date of the making of the contract and was also in the possession of the bank subject to the lien of their pledge on the date of the filing of the proceeding in this Court by Mr. Fleishhacker. We offer to prove that.

“The Referee: Very well.”

(See reporter’s transcript hereinbefore referred to, pages 14 to 20 inclusive.)

Referring to the letter of September 20, 1938, the Receiver’s Exhibit No. 2, my attention having been called to the second paragraph which states: “I still owe you dividends paid last year on this stock, amounting to \$4,350, less \$1,394.94 due me, leaving a balance due you of \$2,955.06, which I will pay you at a later date,” that figure, \$1,394.94 refers to money due me from Herbert Fleishhacker; that is a claimed obligation due me from Mr. Fleishhacker at that time; on the date of the filing of the proceeding in this court by Mr. Fleishhacker that money had not been paid to me by him; that money has not been paid to me by the receiver since the filing of the proceeding.

### Cross Examination

By Mr. Glicksberg:

This offset of \$1,394.94 was due me in a settlement for some cash money that he owed to the Edward J. Goldie Importation Company, which I took over, that was just part of it and the other was

something else; I don't recall, \$275 or \$300, I haven't the other item; this went back as far as 1933 or 1934 that he owed that for; what I said was that the \$1,119.94 of this purported claimed offset of mine was a debt due by Herbert Fleishhacker to the Edward J. Goldie Importation Company; and the Edward J. Goldie Importation Company was a corporation at that time, it went out of business, I think, in the fall of 1934 or the spring of 1935, I believe; I don't just remember the exact date; I think it went out in 1935; I don't think the Edward J. Goldie Importation Company still did business in 1936; with reference to this purported statement from the Edward J. Goldie Importation Company to H. F. Fleishhacker, I presume this was a statement after [109] they had closed up; I notice there considerable purchases made by Herbert Fleishhacker from the Edward J. Goldie Importation Company during the year of 1936; I know we made a settlement, it was agreed upon that he would pay that at the time that I wrote him the memorandum; when we settled that very memorandum you looked over here, he agreed to it, so did I, that that should be deducted.

“Q. Have you any memorandum to that effect in writing?

“A. Only what you have there.

“Q. What?

“Mr. Stark: Exhibit 2.

“Mr. Glicksberg: Q. This?



“The Witness: A. Yes.

“Q. Did Mr. Fleishhacker ever sign that?

“A. I don’t think so.

“Mr. Stark: It must be apparent that Mr. Fleishhacker has not placed his name on the document. All you have to do is to look at it.

“Mr. Glicksberg: It must be apparent?

“Mr. Stark: That his name is not on there. Why ask this witness a ridiculous question like that?

“Mr. Glicksberg: Ridiculous questions count. I have a right to, Mr. Stark, under cross examination. The witness can refer to the exhibit.

“Mr. Stark: I know these colloquies between counsel are meaningless to you, your Honor. It must be patent that it is not there.

“The Referee: Why continue it, Mr. Stark, when you know it is meaningless?

“Mr. Glicksberg: Q. Mr. Goldie, going back to the purported offset which you claim, the \$1,194.94 is an obligation of Herbert Fleishhacker to the Edward J. Goldie Importation Company, a corporation?

“The Witness: A. It was an obligation to myself. [110]

“Q. Well, have you any assignment of the obligation from the corporation?

“A. It is not necessary. It was our business. We owned it, it belonged to my family.

“Q. That is right, but it still was a corporation? A. Yes, sir.

“Q. At all times it has been conducted as a corporation? A. Yes, sir.

“Q. You individually are only one of the stockholders of the corporation?

“A. The controlling.

“Q. You have control of the corporation, but still you are only one of the stockholders?

“A. Yes, sir.

“Q. At no time have you had an assignment from the Edward J. Goldie Importation Company of the claim which the Edward J. Goldie Importation Company had against Herbert Fleishhacker? A. No, sir.”

(See reporter's transcript hereinbefore referred to, pages 22 to 24 inclusive.)

### Redirect Examination

By Mr. Stark

My son, Edward J. Goldie, was president of the Edward J. Goldie Importation Company; this obligation of \$1,119.94 covered sales by the Edward J. Goldie Importation Company to Mr. Fleishhacker, and the Edward J. Goldie Importation Company went out of business; possibly I am mistaken the date it went out of business; I thought it was much before the time this shows; you (Mr. Stark) handled the transaction in regard to the sale of the assets of that corporation;

“Mr. Stark: If I tell you, Mr. Glicksberg, that the transfer of all the physical assets of the Edward J. Goldie Importation Company took place in June of 1936, would you accept that to be the fact?

“Mr. Glicksberg: My associate suggests, Mr. Stark, that we have no objection to stipulating to your statement that the corporation went out of business on that particular date. As to what happened to the physical assets, we would not want to stipulate. [111]

“Mr. Stark: All right. I simply wanted to clear up the minor feature in the testimony of Mr. Goldie that it went out of business in 1935. It was June, 1936, and I believe the disposition of the assets was to a firm known as the Distillers' Distributing Co.”

(See reporter's transcript, pages 24 and 25 inclusive.)

I had a discussion with my son, Eddie, the president of the Edward J. Goldie Importation Company, with regard to this \$1,394.94 owing by Mr. Fleishhacker to the Edward J. Goldie Importation Company. On one or two occasions I discussed the matter of the \$1,394.94 owing from Mr. Fleishhacker to the Goldie Importation Company with Mr. Fleishhacker; I do not recall approximately when the one or two conversations took place; it must have been just two or three months prior to



the date of my letter of September 20, 1938, to Mr. Fleishhacker, that I first spoke to him about it; the conversations took place in his office in the bank, I would say two or three months before September 20, 1938, the date of the letter; I called his attention to the amount due the Edward J. Goldie Importation Company, just two occasions, I brought that up to him; he said, "Take that off the dividends"; (At this point the statement rendered to H. F. Fleishhacker, No. 1 Sansome Street, San Francisco, California, was offered and received in evidence as Receiver's Exhibit No. 3.)

"Mr. Glicksberg: The statement was attached to that letter. We except the portion in writing underneath.

"Mr. Stark: You will agree that the portion on the letterhead of the Rainier Brewing Company can go in, won't you?

"Mr. Glicksberg: That is correct. The pencil notation is not a part of it.

"Mr. Stark: Q. There is a variance in the amount of the statement, \$1,119.94 and the amount referred to in the letter of September 20 as being \$1,394.94, of \$280. Do you know what that \$280 represented?

"The Witness: A. That was a cash item. I cannot recall what that was due for, but he admitted it at the time that it was due to me.

“Q. Some money he owed you?

“A. Money coming to me from him; what for, I cannot recall at this time.

“Q. You discussed the matter of the \$1,119.94?      A. Yes.

“Q. And the \$280 to make up the total in the letter of September 20?

“A. Yes, that is right; that is correct.

“Mr. Stark: That is all from Mr. Goldie.

“Recross Examination

“Mr. Glicksberg: Except this further question on recross.

“Q. Irrespective of your conversation with Mr. Fleishhacker, at the time you had that conversation with Mr. Fleishhacker, this \$1,119.94 was due to the Edward J. Goldie Importation Company, a corporation?

“A. Well, I considered it was due to me.

“Q. I appreciate that, but so far as the record?      A. He agreed it was due me, too.

“Q. He agreed?      A. Yes.

“Q. What did he say?

“A. Well, the fact that he agreed to have it deducted off the amount. He accepted that letter.

“Q. Which letter? Did you pay him anything with reference to the memorandum about the \$4,350?      A. Yes, sir.

“Q. You did not make a payment on that account?

“A. I wrote that and he accepted it.

“Q. He accepted the letter?

“A. It was accepted by him.

“Q. At that time you had no title?

“He agreed absolutely to those figures.

“Q. That he owed the Goldie Importation Company \$1,194.94?

“A. And was willing to give me the credit for it because he felt it was my money, it was due Joe Goldie.

“Q. Did you ever give him a bill paid in full from the Edward J. Goldie Importation Company?

“A. I don't remember. Chances are I did.

“Q. Do you remember whether the Edward J. Goldie Company has ever given him a bill paying the obligation in full? [113]

“A. I cannot tell that.

“Q. At the time you made the arrangement with Mr. Fleishhacker, Mr. Goldie, the money was due to the corporation?

“Mr. Stark: Due to whom?

“Mr. Glicksberg: Due to the Goldie Importation Company, a corporation, from Mr. Fleishhacker.

“Mr. Stark: I submit that is absolutely contrary to what the witness testified.



“Mr. Glicksberg: We will submit the question.

“The Referee: He may answer. It is cross examination.

“(Question read.)

“The Witness: A. Well, I again state I considered it was due to me.

“Mr. Glicksberg: Q. You considered it?

“A. Yes, and so did he.

“Q. But you never received an assignment from the corporation?

“A. No, no.

“Q. You never saw to it that the corporation cancelled the obligation of Mr. Fleishacker?

“That figure was cancelled on the books.

“Well, when?

“At the time I took it over.

“Q. Did you cause the obligation to be cancelled?

“A. Off the books; I think it was.

“Q. Are you certain about it?

“A. Pretty sure.

“Mr. Stark: You see, Mr. Goldie was not the bookkeeper for the Edward J. Goldie Importation Company. As a matter of fact, I don't think he was an officer of the company.

“The Witness: No, no.

“Mr. Stark: Although his family and he himself did own all the stock of the company.

“The Witness: That is right.

“Mr. Glicksberg: No further questions.”

(See reporter’s transcript, pages 27 to 29 inclusive.) [114]

As testified to by Leon Sloss, called for the respondent:

I reside at 2700 Broadway, San Francisco, and I am connected with the Anglo California National Bank as vice president in charge of collateral loans and keeping of collateral records, things of that nature;

“Q. Has the Anglo California National Bank an account with Mr. Joseph Goldie?

“Mr. Glicksberg: I am going to object to that, if your Honor please, as entirely irrelevant, incompetent, and immaterial and not within the issues of this case.

“The Referee: What is the materiality?

“Mr. Stark: I am going to show, and to save time, if your Honor please, I will offer to show at this time, that the loan records of the Anglo California National Bank will disclose that since 1933 at least, long prior to the transaction in regard to this contract, that all of the stock issued in Mr. Goldie’s name in Pacific Products was on deposit with the Anglo California National Bank in pledge to secure a

loan that ranged through a figure of approximately \$165,000, if I remember, down to the present balance of some \$65,000; and, further, at no time has Mr. Goldie has any possession of any of this stock; at no time has Mr. Fleishhacker had possession of this stock. And, following the making of the contract, both Mr. Goldie and Mr. Fleishhacker, pursuant to the terms of it, sought to persuade the bank to release a portion of the Pacific Products stock and subsequently a portion of the Rainier Brewing Company A stock in compliance with the conditions of the contract that that be done, and the bank refused to do it.

“Mr. Glicksberg: To which attempted introduction we object as entirely incompetent, irrelevant and immaterial and an attempt to change the terms of a written instrument and it is not an act which is impossible of performance. Under the terms of the contract it is a collateral obligation and we are not concerned with the rights [115] of these parties, whether it might have been a hardship or not on Mr. Goldie to perform. This is this particular contract.

“Mr. Stark: I think perhaps, your Honor, Mr. Glicksberg has misconstrued the purpose of the offer. The contract, if your Honor will notice, is that the parties to the contract will



perform the mechanics in regard to the delivery of the stock to the transfer agent of the company and have it reissued to split off these shares Mr. Fleishhacker was supposed to get under the contract. I wish to show by this testimony that an effort to do that was made on the part of Mr. Fleishhacker and Mr. Goldie, and the bank refused, being a third party not designated in the contract, to do that act of mechanics.

“Mr. Glicksberg: I am going to object, if your Honor please, on the ground that it is entirely incompetent, irrelevant and immaterial to the issues of the case at the present time. Mr. Stark has twice made the assertion that the use of the word ‘parties’ in the particular contract included both. We maintain it was purely a phraseology of Mr. Stark who drew the instrument. As a matter of fact, Mr. Fleishhacker could do nothing about that so far as the terms of the contract were concerned, if Mr. Goldie refused to deliver the stock for cancellation or make arrangements with the bank to have it divided in its respective form. Under the particular agreement, Mr. Goldie had the obligation to proceed to have the stock divided in two certificates and have one issued to Mr. Fleishhacker as collateral. The mere fact that he had financial obligations which made it finan-

cially difficult for Mr. Goldie to do, certainly cannot warrant an attempt to vary the terms of this written instrument; neither can they bring in attempts of the parties other than based on the four corners of that document.

“The Referee: Do I understand this, Mr. Stark, this condition was prevailing so far as the bank is concerned at the time the contract was drawn?

“Mr. Stark: The situation was this, your Honor: At the time [116] the contract was drawn and many years before that the stock holdings of Mr. Goldie had been pledged to the Anglo California National Bank. The contract was made, and no one knows more about the contract than I do. The contract was made on the statement of Mr. Fleishhacker that he would be able to get a release of a portion of that stock from the pledge.

“The Referee: But, was that incorporated in the contract?

“Mr. Stark: Yes, your Honor.

“Mr. Glicksberg: We submit, if your Honor please, we would like counsel to show us that in the contract.

“The Referee: Point it out, Mr. Stark.

“Mr. Stark: I read it to you once.

“The Referee: I would like to hear it again.

“Mr. Stark: In the first place the contract is signed by Mr. Goldie and Mr. Fleishhacker.

Page 2, the first paragraph of the charging clause of the contract, following the 'Witnesseth' provides:

“ ‘That the parties hereto’, p-a-r-t-i-e-s; not ‘party’; not Mr. Goldie or not Mr. Fleishhacker alone, but the two of them acting jointly together,

“ ‘Shall forthwith, upon the execution of this agreement, cause to be delivered to the transfer agent of Pacific Products, Inc., a corporation, the stock certificate.’

“Nowhere did the contract say the parties should, because the parties knew the stock was pledged to the Anglo Bank.

“Mr. Glicksberg: If your Honor please, we are going to object to Mr. Stark’s making any statement in the record of any intention of the parties that cannot be gathered from the four corners of the instrument. He knows legally that we cannot introduce any intention other than the Court can determine from the written instrument itself. If Mr. Stark, when he drew the instrument, had a different intention, he should have placed it in this instrument to protect his client. He has not done so and I submit that Mr. Goldie is bound by the terms of the instrument as it appears in Court today. [117]

“The Referee: That is the very reason why I wanted to know if this was known to the parties at the time the contract was drawn.

“Mr. Stark: Indeed it was.



“The Referee: Then the offer may be denied and the objection sustained.

“Mr. Stark: That is on the point of my offer of proof?

“The Referee: Yes.

“Mr. Stark: That it was the duty of both parties to perform the mechanics of splitting this stock off.

“The Referee: Yes.

“Mr. Stark: May I have an exception, your Honor?

“The Referee: Yes.

“Mr. Stark: That is all.”

(See reporter's transcript, pages 30 to 33 inclusive.)

As Testified to by Harry T. Thompson, called for by the Respondent:

I am an employee of the Anglo California National Bank; I am acting as secretary for Mr. Herbert Fleishhacker, with the approval of the bank; and have acted as such about 20 years; I do not know of my own knowledge whether or not Mr. Fleishhacker ever made any effort to get any portion of the stock of the Pacific Products Company, standing in the name of Mr. Goldie on pledge with the bank, released from the pledge;

I am familiar with the letter of September 20, 1938, Receiver's Exhibit No. 2, and I know that the item of \$1,394.94 was deducted; my recollection is that it was deducted as a conclusion to conversations that were had between parties;

## Cross Examination

By Mr. Glicksberg.

From my records, Mr. Fleishhacker was indebted to the Edward J. Goldie Importation Company for \$1,119.94 of that amount; when I testified that it was deducted, I meant deducted from the dividend due Mr. Fleishhacker on the 3,000 shares; to my knowledge Mr. Fleishhacker has not received any dividends other than that of \$1,800; as [118] to whether the deduction was on my records, I don't know whether I had any record of it or not except the written correspondence; as to whether or not it was considered an obligation of Herbert Fleishhacker to the Edward J. Goldie Importation Company, the letter speaks for itself; it was an obligation of Mr. Fleishhacker to the Edward J. Goldie Importation Company.

## Redirect Examination

By Mr. Stark:

“Mr. Stark: Q. Mr. Thompson, the subject matter of this contract had been a matter of conversation between the parties over a period of years prior to taking form?

“A. I understand——

“Mr. Glicksberg: I am going to object to that as entirely incompetent, irrelevant and immaterial.

“Mr. Stark: Don't answer too hurriedly.

“The Referee: It may go out.

“Mr. Glicksberg: As entirely incompetent, irrelevant and immaterial and an attempt to vary the terms of a written instrument.

“The Referee: Yes, if it was prior to the making of the written instrument, the California Code Section takes care of that, Mr. Stark, and the objection is sustained.

“Mr. Stark: May I have an exception, your Honor?

“The Referee: Yes.

“Mr. Stark: Q. Was there any money paid by Mr. Goldie over to Mr. Fleishhacker by way of dividends on the 3,000 shares of Rainier Brewing Company A stock prior to the making of that contract?

“Mr. Glicksberg: We are going to object to that, your Honor, as entirely immaterial, not within the issues before this Court at the present time.

“The Referee: It may be sustained.

“Mr. Stark: May I have an exception, your Honor?

“The Referee: Yes. That is made strictly on the proposition that there is a Code Section that covers all negotiations and matters that happened prior to the making of the contract.

“Mr. Stark: That have been reduced to writing.

“The Referee: And merged in the contract.



“Mr. Stark: Unless there exists an ambiguity in the writing.

“The Referee: In the event there is, I think the only question that can be raised would be a question of fraud.

“Mr. Stark: Of course, we are making no such point as that; simply a failure of the parties to meet from the standpoint of minds.

“The Referee: If there is an ambiguity of the contract, you can give testimony interpreting the contract.

“Mr. Stark: Yes.

“The Referee: But you cannot, as I understand, go back and incorporate in the contract by interpretation something that transpired prior to the making of the contract.

“Mr. Stark: We contend no ambiguity exists. Counsel for the receiver is the one who is contending for the ambiguity.

“Mr. Glicksberg: Oh, no, we are satisfied with the agreement.

“The Referee: If there is no ambiguity, then strictly the objection is sustainable.

“Mr. Stark: All right. Thank you very much, Mr. Thompson.

(Witness excused.)

“Mr. Stark: We rest on the jurisdictional question, your Honor.”

(See reporter's transcript, pages 36 and 37 thereof.)

At the conclusion of the hearing, the matter was submitted on briefs. After the briefs had been filed and considered, in conjunction with the evidence adduced, the following opinion, together with findings, conclusions and order on objection to court's jurisdiction to proceed summarily, was filed:

“There is but one question before the court at this time, that is, has this court the right to proceed summarily against the respondent, Joseph Goldie, who has challenged the court's jurisdiction so to do?

“In passing upon said question, the only record which the court is entitled to have before it is that [120] presented by the verified petition of the receiver, the order to show cause directed against Joseph Goldie, the latter's written objection to the court's jurisdiction, and the evidence produced on the hearing relative to the question of jurisdiction, and not otherwise.

“Based upon such record, and more particularly upon the written objection of said respondent, Joseph Goldie, and said evidence, the court finds the following facts:

“1. That by reason of the form and substance of his written objection to the court's jurisdiction, the respondent, Joseph Goldie, has waived, and did waive, the objection to jurisdiction and now is before the court by a general appearance, and for all purposes;

“2. That by calling the witnesses, Leon Sloss, Jr. and Harry T. Thompson, and subjecting them to oral examination on behalf of said respondent, said respondent, Joseph Goldie, has waived, and did waive, the objection to jurisdiction and now is before the court for all purposes;

“3. That said respondent, Joseph Goldie, at the time of the filing of the petition by the debtor herein, and also at the time of the filing of said petition by said receiver, was, and now is, acting as a trustee of said debtor, and

“4. That said respondent, Joseph Goldie, at the time of the filing of the petition by the said debtor, and also at the time of the filing of said petition by said receiver, was, and now is, indebted to the debtor, but that the court, without waiving the right so to do at a later date, at this time, in passing upon the question of jurisdiction, does not undertake to pass upon the amount of said indebtedness. [121]

“Upon the facts as found herein, the court concludes as matters of law:

“1. That both by his written objection to the jurisdiction and by calling the aforesaid witnesses, the respondent, Joseph Goldie, has appeared herein generally and made a response to the receiver's said petition upon the merits;

“2. That the receiver is entitled to proceed summarily herein against said respondent, Joseph Goldie, a trustee of said debtor;



“3. That said respondent, Joseph Goldie, is entitled to a reasonable time within which to file a further response, upon the merits, to the receiver’s petition and order to show cause, and

“4. That to the end that the matter may be fully presented upon the merits, said respondent, Joseph Goldie, is entitled to the process of this court to have produced such further competent evidence as he may be desirous of offering, whether said evidence is sought to be given by witnesses orally, or by documentary evidence, not including affidavits.

“It is therefore hereby ordered, adjudged and decreed that the objection of the respondent, Joseph Goldie, to the jurisdiction of this court to proceed summarily upon the receiver’s petition and order to show cause be, and it is, overruled, that the said respondent be given five days from this date within which to make further response, upon the merits, to said petition and order to show cause, if he be so advised, and that the hearing upon said petition and order to show cause, upon the merits, be, and said hearing is, fixed for the 19th day of May, 1939, at the hour of 10 o’clock A. M.

Dated: May 5th, 1939.

“BURTON J. WYMAN,  
Referee in Bankruptcy.” [122]

(See original of said Opinion, Findings, Conclusions and Order on Objection to Court’s Jur-

isdiction to Proceed Summarily, handed up herewith as a part of this certificate and report.)

Thereafter, and within the time provided by law, there was filed on behalf of the aforesaid respondent, the following verified petition to review referee's order:

“The petition of Joseph Goldie respectfully shows:

“That in the course of the proceedings herein, to-wit, on the 5th day of May, 1939, an order was made by the Referee overruling the plea of your petitioner objecting to the summary jurisdiction of the court, which order is designated ‘Opinion, Findings, Conclusions and Order on Objection to Court’s Jurisdiction to Proceed Summarily’, a copy of which is hereto annexed and marked Exhibit ‘A’.

“I.

“That such order was and is erroneous in that said order purports to hold that by reason of the form and substance of the written objection of your petitioner to the court’s summary jurisdiction your petitioner had waived and did waive the objection to the jurisdiction of the court and was before the court by a general appearance and for all purposes; whereas, your petitioner, in his verified return required to be filed by him, appeared specially and not

otherwise for the sole purpose of objecting to the summary jurisdiction of the court and moving said court for an order quashing the service of the order to show cause made upon him and, in his return to the order to show cause issued by the referee, set forth therein the facts sustaining his plea objecting to the jurisdiction of said court.

“II.

“That said order of the referee was and is erroneous in that the Referee has purportedly held that by reason [123] of your petitioner calling witnesses and submitting them to oral examination on his behalf said petitioner has waived and did waive the objection to the jurisdiction of the court and is now before the court for all purposes; whereas, your petitioner was required, by reason of the order to show cause issued by the Referee, to call witnesses in order to support the facts set forth in his return and offer proof of the transactions had upon which he based his claim as an adverse claimant and to sustain his plea objecting to the summary jurisdiction of the Referee to hear or determine the adverse claim of your petitioner.

“III.

“That said order was and is erroneous in that the said Referee has attempted to make a finding and did make a finding upon the merits of the controversy between your petitioner and



the Receiver in that said order finds as a matter of fact that your petitioner was and now is acting as a trustee of Herbert Fleishhacker, the debtor in the above entitled proceedings.

“IV.

“That said order was and is erroneous in that the said Referee has attempted to make a finding and did make a finding upon the merits of the controversy between your petitioner and the Receiver in that said order finds as a matter of fact that your petitioner was and now is indebted to the debtor, Herbert Fleishhacker.

“V.

“That said order of the Referee was and is erroneous in that said findings of fact that your petitioner was and is a trustee and was and is a debtor of said Herbert [124] Fleishhacker did attempt to finally adjudge that your petitioner has become liable to said Receiver as such trustee and as such debtor, and has denied to your petitioner the right to have the issues as to whether or not your petitioner was and is a trustee of said debtor or was and is indebted to said debtor tried in a plenary proceeding as demanded by said petitioner.

“VI.

“That said order of the Referee was and is erroneous in that the said Referee concludes

as a matter of law that by reason of said findings made by him over the objection of your petitioner appearing specially that your petitioner has appeared generally and made response to the Receiver's petition upon the merits and that said Receiver is entitled to proceed summarily herein against your petitioner as a trustee of Herbert Fleishhacker, the debtor herein.

“VII.

“That said order of the Referee was and is erroneous in that while said order purports to allow your petitioner a right to plead upon the merits and proposes that he subject himself to the summary jurisdiction of the Referee, while in truth and in fact said order has attempted to finally adjudge the issues summarily over the objection of your petitioner, excepting the Referee has reserved a right to determine the amount of the alleged indebtedness by your petitioner to said debtor and his said Receiver.

“VIII.

“That said order was and is erroneous in that upon a further hearing before said Referee, pursuant to his asserted summary jurisdiction, said petitioner will be precluded from the right as a matter of law to present [125] any evidence upon the issues as to whether or not he is or was acting as a trustee for said debtor and whether or not he is or was indebted to said

debtor at the time of the commencement of said proceedings or at the time of the filing of the petition for an order to show cause by the Receiver.

“Wherefore, your petitioner, feeling aggrieved because of such order, prays that same may be reviewed by a judge of this court as provided in the Acts of Congress relating to bankruptcy.

“JOSEPH GOLDIE,  
Petitioner.

“TORREGANO & STARK  
By CHARLES M. STARK  
Attorneys for Petitioner.”

[Verification and copy of the aforesaid Opinion, findings, conclusions and order on objection to court's jurisdiction to proceed summarily, omitted for sake of brevity.]

(See original of said Petition to Review Order of Referee which is handed up herewith as a part of this certificate and report.)

#### UNDISPUTED FACTS HEREIN

The undisputed facts, according to the record herein, are as follows:

On September 29, 1937, Joseph Goldie, the respondent, and Herbert Fleishhacker, the debtor, entered into the agreement which is marked “Exhibit A”, and is attached to and made a part of the



receiver's petition for a turn-over order.

(See pages 7 to 11, inclusive, of this certificate and report.) [126]

The above referred to agreement was drawn by Charles M. Stark, Esq., the attorney for said respondent.

(See page 39 of this certificate and report.)

On September 20, 1938, said respondent delivered to the debtor herein, Herbert Fleishhacker, \$1800.00, which was a dividend of 60 cents a share on the 3,000 shares of Rainier Brewing Company class A stock mentioned in the agreement; said respondent thought that on October 21, 1937, he had received a dividend of \$1.30 per share from said brewing company; he had received a further dividend of 15 cents per share on said brewing company stock, he thought, on November 20, 1937; on September 16, 1938, said respondent received a further dividend of 60 cents a share upon said stock; he had received a further dividend on said 3,000 shares of stock of \$1.15 per share on October 24, 1938, and on December 29, 1938, said Rainier Brewing Company declared an additional dividend of 60 cents per share upon said last mentioned stock which was payable at the rate of 20 cents per share on January 10, 1939, February 10, 1939, and March 10, 1939, all of which said last mentioned payments had been received by said respondent, but none of which had been paid to the debtor except the sum of \$1,800 referred to hereinbefore.

(See pages 22 and 23 of this certificate.)

Every time a dividend was paid, the respondent affirmed his intention to make the payments to the debtor.

(See page 23 of this certificate and report.)

September 20, 1938, the respondent wrote the debtor the following letter:

“San Francisco, California

“September 20, 1938

“Mr. Herbert Fleishhacker

“No. 1 Sansome Street

“San Francisco, California

“Dear H. F.:

“Herewith my check for \$1800.00 to cover the 60¢ per share dividend just paid by Rainier Brewing Company on the 3000 shares of “A” stock due you from me. [127]

“I still owe you dividends paid last year on this stock amounting to \$4350.00, less \$1394.94 due me, leaving a balance due you of \$2955.06 which I will pay you at a later date.

“Yours very truly,

(Signed)

“JOSEPH GOLDIE.”

(See receiver’s exhibit No. 2, referred to on page 25 of this certificate and report, the original of said letter being handed up herewith as a part of this certificate and report.)

The claimed off-set of \$1,119.94 is claimed by the respondent to be due from the debtor to Edward J. Goldie Importation Company, a corporation.

(See page 32 of this certificate and report.)

Edward J. Goldie Importation Company, of which Edward J. Goldie, respondent's son, was president, was a family corporation which went out of business, June, 1936.

The claim of said corporation against the debtor was never assigned to said respondent.

(See page 34 of this certificate and report.)

On December 31, 1937, Edward J. Goldie, the son of the respondent, Joseph Goldie, sent the following letter on the letterhead of Rainier Brewing Company, Inc., to No. 1 Sansome Street, San Francisco, California, for the debtor:

“San Francisco, California

“December 31, 1937

“Mr. E. Mitchell

“ #1 Sansome Street,

“San Francisco, California.

“Dear Eddie:

“Enclosed, herewith, is the statement you requested.

“Very truly yours

(Signed)

EDWARD GOLDIE

“EDWARD J. GOLDIE”

Encl. (1)

EM.”

(See original of said letter which is attached to the statement referred to therein, which said statement and said letter, constitute Receiver's Exhibit No. 3, is handed up herewith as a part of this certificate and report.) [128]



## DATE OF FILING DEBTOR'S ORIGINAL PETITION HEREIN

The debtor filed his petition herein seeking the protection of this court under Chapter XI of the Bankruptcy Act, on November 23, 1938.

(See original of said petition on file in the office of the Clerk of this Court.)

## SUPPLEMENTAL DISCUSSION BY AND OPINION OF REFEREE

To the end that the reviewing court may further be aided in dealing with the major question presented, the opinion hereinbefore expressed, without citation of authorities, is hereby supplemented by additional discussion, including references to certain decisions which undoubtedly will prove helpful.

Upon the petition for review herein, the court must determine, (1) Whether or not the respondent is before the court by a general appearance by reason of the form and substance of his written objection to the court's jurisdiction, (2) Whether or not the respondent waived the objection to the jurisdiction of the court by reason of the calling of witnesses, Leon Sloss, Jr., and Harry T. Thompson, (3) Whether or not, at the time of the filing of the debtor's petition, and also at the time of the filing of the receiver's petition involved herein, the respondent was the trustee of the debtor, so far as any of the money in controversy is concerned, (4) Whether or not, at the time of the filing of the debt-

or's petition herein, at the time of the filing of the receiver's aforesaid petition, and at the time of the making of the order questioned by the petition for review, said respondent was (and now is) indebted to said debtor in an amount undetermined, and (5) Whether or not, on the undisputed facts, the claim of the respondent appears to be merely colorable.

I. Is there anything contained in the written objection to the court's jurisdiction which converts the so-called special appearance into a general appearance, thereby waiving respondent's right to raise [129] the question of jurisdiction? Unquestionably there is. Beginning on line 28 and ending on line 32 of page 5 of said written objection, page 17 of this certificate and report, this language appears:

“That upon the refusal of said Anglo California National Bank to deliver to Herbert Fleishhacker three thousand (3,000) shares of the Rainier Brewing Company stock referred to hereinabove, the agreement of September 29, 1937, became inoperative and of no force and effect;”

Clearly this is an answer going to the merits of the controversy, in fact to the very heart thereof, i. e., to the validity of the agreement setting forth the rights of the debtor and respondent. This being so, it would appear that the situation presented, so far as this point is concerned, is governed by what was said In re Kornit Mfg. Co., (D.C., N.J.) 192 F. 392, 395, wherein it is declared, “It is ele-

mentary law that neither at law nor in equity can a challenge to the jurisdiction be joined with a defense to the merits. When this is done, the court will disregard the objection to the jurisdiction, and put the defendant to his defense.” As was said in *Massachusetts Bonding & Ins. Co. v. Concrete Steel Bridge Co.*, (C.C.A. 4) 37 F.(2d) 695, 701, “ ‘Whether an appearance is general or special does not depend on the form of the pleading filed, but on its substance. If a defendant invoke the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general. There are cases where the defendant may make a quasi appearance for the purpose of objecting to the manner in which he is brought before the court, and in fact to show that he is not legally there at all, but if he ever appears to the merits he submits himself completely to the jurisdiction of the court and must abide the consequences. If he appears to the merits, no statement that he does not will avail him, and if he makes a defense which can only be sustained by an exercise of jurisdiction, the appearance is general, whether it is in terms limited to a special [130] purpose or not.’ *Daily Motor Co. v. Reaves*, 184 N.C. 260, 114 S. E. 175, 176.

“ ‘Broadly stated, any action on the part of a defendant, except to object to the jurisdiction over his person, which recognizes the case as in court, will constitute a general appearance.’ 4 *Corpus Juris*, 1333.



“ ‘There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits.’ *Merchants’ Heat & Light Co. v. James H. Clow & Sons*, 204 U. S. 286, 27 S. Ct. 285, 286, 51 L. Ed. 488.”

See, also, *Manning v. Furr*, (Court of Appeals, Dist. of Columbia), 66 F.(2d) 807, 808, *Benedict v. Seiberling*, (D.C., N.D., Ohio) 17 F.(2d) 841, 843, and *Leonardi v. Chase Nat. Bank of City of New York*, (C.C.A., 2) 81 F.(2d) 19, 20, (certiorari denied by Supreme Court of the United States, 298 U. S. 677, 56 S. Ct. 941, 80 L. Ed. 1398) wherein the court, in the latter case, thus stated the rule, “A general appearance is entered whenever the defendant invokes the judgment of the court in any way, on any question other than the court’s jurisdiction without being compelled to do so by previous rulings of the court sustaining jurisdiction.”

It is to be noted that no rulings had been made sustaining the jurisdiction when respondent answered to the merits of the controversy.

See, also, *Blackmer v. United States* (C.A., Dist. of Columbia) 49 F.(2d) 523, 529, the ruling therein being undisturbed on certiorari, 284 U.S. 421, 52 S. Ct. 252, 76 L. Ed. 375.

II. If by any far-fetched interpretation of the respondent’s conduct, it could be said there is nothing contained in his written objection to the court’s jurisdiction, which could convert said objection into

a plea to the merits of the controversy, is there any escape [131] from the proposition that by calling the witnesses in his behalf, under the circumstances present herein, the respondent thereby changed a special appearance, if, upon its face it can be so called, into a general appearance? It would seem that the answer must be in the negative. The rule in this regard is clearly stated in *Poage v. Co-Operative Pub. Co.*, 66 Pac. (2d) 1119, 1125, 57 Idaho, 561, 574, wherein the court said: “ \* \* \* participation in the trial \* \* \* by examining and cross-examining witnesses constituted a general appearance. *Miller v. Prout*, 33 Idaho, 709, 713, 197 P. 1023; *Pittenger v. Al G. Barnes Circus*, 39 Idaho, 807, 811, 230 P. 1011. Finally, if a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection. *Pingree Cattle Loan Company v. Webb & Co.*, 36 Idaho, 442, 446, 211 P. 556; *Pittenger v. Al G. Barnes Circus*, *supra*; *American Surety Co. v. District Court*, 43 Idaho, 589, 598, 254 P. 515; *Burrows v. Burrows*, 10 Cal. App. (2d) 749, 52 P.(2d) 749, 52 P.(2d) 606.”

III. On November 23, 1938, the date upon which the debtor filed his petition herein seeking the protection of this court under Chapter XI of the Bankruptcy Act, and on April 3, 1939, the date upon which the receiver filed the petition here under discussion, was the respondent a trustee, and indebted to the debtor herein?

The record, supplemented by applicable law, shows that the respondent was a trustee and debtor

of the debtor at these times, and for that matter, still is. The rule is that "Every person who receives money to be paid to another, or to be applied to a particular purpose to which he does not apply it, is a trustee \* \* \*" *Woodmansee v. Schmitz*, 232 N.W. 774, 775, 202 Wis. 242, 246, *In re Vorsburgh's Estate*, 123 A. 813, 815, 279 Pa. 329, 332. That property in the hands of the trustee of a debtor under the protection of the Bankruptcy Act is constructively in the possession of such debtor and hence is subject to the summary jurisdiction of the court was clearly ruled by the Supreme Court [132] of the United States, in *Taubel-Scott-Kitzmiller Co., Inc., v. Fox et. al.*, 264 U. S. 426, 432, 433, 44 S. Ct. 396, 398, 399, 68 L. Ed. 770, 774, wherein Mr. Justice Brandeis, dealing with the question of possession and the right of a bankruptcy court to proceed summarily where possession is in the debtor, declared: "Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the trustee, where the property was delivered to the trustee, but was thereafter wrongfully withdrawn from his custody; where the property is in hands of the bankrupt's agent or bailee; where the property is held by some other person, who makes no claim to it; and where the property is held by one who makes a claim, but the claim is colorable only. As every court must have power to determine, in the first instance, whether it has jurisdic-



tion to proceed, the bankruptcy court has, in every case, jurisdiction to determine whether it has possession, actual or constructive. It may conclude, where it lacks actual possession, that the physical possession held by some other persons is of such a nature that the property is constructively within the possession of the court.”

See, also, *May v. Henderson*, 268 U.S. 111, 115, 45 S. Ct. 456, 458, 69 L. Ed. 870, 873, wherein it is said, “\* \* \* property held or acquired by others for account of the bankrupt is subject to a summary order of the court, which may direct an accounting and a payment over to the trustee or receiver appointed by the Bankruptcy Court. *White v. Schloerb*, 178 U. S. 542; *Mueller v. Nugent*, 184 U.S. 1; *Babbitt v. Dutcher*, 216 U. S. 102; *Chicago Board of Trade v. Johnson*, 264 U. S. 1.”

Even if it could be held that the respondent has a just claim against the debtor, still upon the record the respondent is holding money belonging to the debtor far in excess of any claim which the respondent could establish against said debtor. Under such circumstances, giving the respondent, for the purpose of this discussion only, the [133] benefit of the proposition that he possibly may be holding property which eventually may come to him, his is a joint possession with the debtor, which brings the case within the rule thus stated by Remington on Bankruptcy (4th Ed.) Vol. 5, Section 2365, Page 554, “Possession by the bankrupt may give jurisdiction to the bankruptcy court even if the posses-

sion is not exclusive, \* \* \*” This rule was followed by this court in *re Latham Square Corporation*, Bankrupt No. 19313 (see special master’s opinion and report in 17 Am. B. R. [N. S.] 525), and also *In re Beatrice H. Hanks*, Bankrupt, No. 16898.

See, also, *In re Brooks*, 91 F. 508, 509, and *In re Wegman Piano Co.*, 228 F. 60, 65.

It therefore seems to follow that the respondent, as trustee of this debtor, is not in a position to question the court’s jurisdiction to proceed summarily to determine the right of the receiver in behalf of the debtor’s estate, as to the money sought to be turned over to said receiver in the proceeding now before the court. This is in keeping with the holding in *Orinoco Iron Co., v. Metzel* (C. C. A. 6) 230 F. 40, 45, wherein it is said: “\* \* \* a debt due the bankrupt’s estate is so far constructively in the trustee’s possession as to give the bankruptcy court jurisdiction to determine the rights of the parties to it. *In re Ransford*, 194 Fed. 658, 664, 115 C. C. A. 560.”

See, also, interesting and enlightening opinion by Augustus N. Hand, Circuit Judge, *In re Worrall* (C. C. A. 2) 79 F. (2d) 88, 90, and to the same effect, *In re Marsters*, (C. C. A. 7) 101 F. (2d) 365, 366, 367, certiorari denied, 306 U. S. 663, 59 S. Ct. 788, 83 L. Ed. 1059.

In the light of the holding in the last mentioned decisions, and regardless of what may be determined in connection with the other points hereinbefore referred to—any one of which appears sufficient to sustain the summary jurisdiction of this

court—there seemingly is no escape from the proposition that, upon the undisputed facts of the case, the claim of respondent is colorable only and consequently such as may be determined in a summary manner. See *May v. Henderson*, *supra*, pages 115, 116, 268 U. S. 45 S. Ct. 458, 459, 69 L. Ed. 874, [134] wherein it is said “Courts of Bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of an adverse claim. The court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the summary remedy is an appropriate one within the principles of decision here stated. *Mueller v. Nugent*, *supra*; *Schweer v. Brown*, 130 Fed. 328, 195 U. S. 171; *Hebert v. Crawford*, 228 U. S. 204; *In re Ellis Bros. Printing Co.* 156 Fed. 430. It may disregard the assertion that the claim is adverse if on the undisputed facts it appears to be merely colorable. *In re Weinger, Bergman & Co.*, 126 Fed. 875; *In re Rudnick & Co.*, 158 Fed. 223; *In re Ransford*, 194 Fed. 658; *Michaelis v. Lindeman*, 196 Fed. 718.”

IV. No point successfully can be made upon the proposition that in passing upon the question of jurisdiction, findings of fact have been made which go to the merits of the controversy. As was said in *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 26, 22 S. Ct. 293, 296, 46 L. Ed. 413, 416, “In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry \* \* \*”



## PAPERS HANDED UP HEREWITH

I hand up herewith the following papers:

1. Petition for Summary Order Directed to Joseph Goldie to Turn Over to Receiver Certain Securities and Moneys Belonging to Debtor;
2. Order to Show Cause Directed to Joseph Goldie;
3. Verified Plea of Respondent Joseph Goldie Objecting to the Summary Jurisdiction of the Above Entitled Court and for an Order Quashing Service of Order to Show Cause Directed to said Respondent as Issued by the Above Entitled Court;
4. Points and Authorities;
5. Memorandum of Points and Authorities Submitted in Support of Petition for Summary Order Directed to Joseph Goldie; [135]
6. Opinion, Findings, Conclusions and Order on Objection to Court's Jurisdiction to Proceed Summarily;
7. Petition to Review Order of Referee;
8. Letter dated September 20, 1938, addressed to Herbert Fleishhacker, from Joseph Goldie;
9. Letter dated December 31, 1937, with statement attached, from Edward J. Goldie; and
10. Transcript of Testimony.

Dated: January 25, 1940.

Respectfully submitted,

BURTON J. WYMAN

Referee in Bankruptcy

[Endorsed]: Filed Jan. 25, 1940. [136]

In the Southern Division  
of the United States District Court  
for the Northern District of California.

No. 30924-S

In the Matter of

HERBERT FLEISHHACKER,  
Debtor.

ORDER

Ordered:

1. That the "Certificate and Report of Referee on Petition for Review of Order of Referee on Objection of Joseph Goldie to Court's Jurisdiction to Proceed Summarily," filed herein on January 25, 1940, is hereby Approved and Confirmed.

2. That the order made by the Referee in Bankruptcy on May 5, 1939, in which it was "ordered, adjudged and decreed that the objection of the respondent, Joseph Goldie, to the jurisdiction of this court to proceed summarily upon the receiver's petition and order to show cause be, and it is, overruled," etc., is hereby Affirmed and Adopted.

Dated: April 26, 1940.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Apr. 26, 1940. [137]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM ORDER OF  
DISTRICT COURT AFFIRMING THE  
REVIEWED ORDER OF REFEREE IN  
BANKRUPTCY.

To the above entitled Court and to the Clerk thereof, and to Sterling Carr, as Receiver of the Estate and Effects of the above named Debtor:

Notice is hereby given that Joseph Goldie, herein referred to as respondent, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit.

From the order made and entered April 26th, 1940, by the above entitled Court approving and confirming the certificate [138] and report of Referee on petition for a review of order of Referee on the objection of respondent Joseph Goldie to Court's jurisdiction to proceed summarily, which order of Referee was filed herein on January 25th, 1940.

From said order made and entered on April 26th, 1940, by the above entitled Court affirming and adopting an order made by the Referee in Bankruptcy on May 5th, 1939, in which it was "ordered, adjudged and decreed that the objection of the respondent, Joseph Goldie, to the jurisdiction of the above entitled Court to proceed summarily upon the receiver's petition and order to show cause be and it is overruled, etc."



That the amount involved in this appeal and the value of the property affected by the orders of the said Referee and said District Court and each of them is more than Five Hundred Dollars (\$500.00).

Dated: May 23d, 1940.

TORREGANO & STARK

By CHARLES M. STARK

Attorneys for Joseph Goldie,  
Appellant  
805 Mills Building  
San Francisco, California

The address of Attorneys for the appellee, Sterling Carr, as Receiver of the estate and effects of Herbert Fleishhacker, Debtor:

Messrs. Francis P. Walsh and Louis J. Glicksberg, 1 Montgomery Street, San Francisco.

Received a copy of the foregoing Notice of Appeal this 23d day of May, 1940.

FRANCIS P. WALSH

LOUIS J. GLICKSBERG

Attorneys for Sterling Carr,  
Appellee.

[Endorsed]: Filed May 23, 1940. [139]

[Title of District Court and Cause.]

STATEMENT OF POINTS PURSUANT TO  
RULE 75(d) FEDERAL RULES OF CIVIL  
PROCEDURE.

Now comes Joseph Goldie, appellant herein, and, pursuant to Rule 75(d) of the Federal Rules of Civil Procedure, sets forth a statement of the points on which appellant intends to rely on appeal, as follows, to-wit:

Point I.

That the above entitled court has no jurisdiction of appellant.

Point II.

That at no time during the course of said proceeding did [140] appellant submit to the jurisdiction of said court, but at all times appellant seasonably objected to the asserted jurisdiction of said court.

Point III.

That appellant did not by the allegations of fact contained in his written return to the order to show cause directed to him by the said court pursuant to the petition of Sterling Carr, as receiver, etc., thereby submit to the jurisdiction of said court or thereby waive his said objection to said asserted jurisdiction.

Point IV.

That appellant did not by calling witnesses and examining them on his objection to the jurisdiction of said court thereby waive his objection to said jurisdiction.

## Point V.

That appellant was not a trustee for said debtor but, to the contrary, appellant's claim to the property sought to be summarily seized from appellant by appellee was real, adverse and more than colorable.

## Point VI.

That the ruling of the referee in bankruptcy that the above entitled court had jurisdiction over appellant in a summary proceeding and the order of the United States District Judge affirming said referee on review was error.

Wherefore, appellant prays that said order and decree of said court be reversed and said appellee be remitted to a plenary action in the premises.

Dated: May 23d, 1940.

JOSEPH GOLDIE,

Appellant

By ERNEST J. TORREGANO

By CHARLES M. STARK

His Attorneys.

[Endorsed]: Filed May 23, 1940. [141]

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[Title of District Court and Cause.]

## COST BOND ON APPEAL.

Know All Men By These Presents: That we, Joseph Goldie, as Principal, and the American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and authorized to transact business in



the State of California, as Surety, are held and firmly bound unto Sterling Carr, as receiver of the estate and effects of Herbert Fleishhacker, Debtor, appellee in the above entitled proceedings, in the sum of Two Hundred Fifty Dollars—(\$250.00)—to be paid to the said appellee, for the payment of which well and truly to be made we bind ourselves jointly and severally, firmly by these presents.

Sealed with our seals and dated this 21st day of May, 1940.

Whereas, an Order was made by the said District Court of the United States on or about the 26th day of April, 1940, confirming an order of the referee in bankruptcy on petition of said Joseph Goldie for a review of an order made herein on or about the 5th day of May, 1939, by Burton J. Wyman, Referee in Bankruptcy, for said District Court. The said order of the Referee in Bankruptcy overruled the objection of Joseph Goldie to the jurisdiction of the above entitled court to proceed summarily upon the Receiver, Sterling Carr's petition and order to show cause.

Now, Therefore, the condition of this obligation is such that if the said Joseph Goldie, Appellant, shall prosecute his said appeal to effect, and answer and pay all costs of appellee if appellant fails to make his plea good, then the above obligation to be void; otherwise to remain in full force and effect.

It is further stipulated as a part of the foregoing bond that in case of the breach of any condition

thereof, the above-named District Court may upon ten days' notice to the Surety above named, proceed summarily in said action or suit to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against said Surety and award execution therefor.

In Witness Whereof, the signature of the said principal is hereto affixed, and the corporate seal and name of the said Surety is hereto affixed and attested at San Francisco, California, by its duly authorized officers, this 21st day of May, 1940.

JOSEPH GOLDIE

(Principal)

AMERICAN SURETY COM-  
PANY OF NEW YORK

By: L. T. PLATT

Res. Vice-President.

Premium \$10.00 per annum.

Attest:

B. DUCRAY

Res. Asst. Secretary.

Bond #520627-K

[Endorsed]: Filed May 23, 1940. [142]

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[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL.

Joseph Goldie, appellant in the above entitled proceeding from the order made by the above entitled court on the 26th day of April, 1940, confirm-

ing certificate and report of Referee in connection with a proceeding to adjudicate in a summary action an adverse claim of appellant, and from which order appellant has appealed, hereby presents his designation of the portions of the records, proceedings and evidence to be contained in the record on appeal, to-wit:

1. Petition by receiver Sterling Carr for summary order [143] directed to Joseph Goldie to turn over to receiver certain securities and moneys, dated April 3, 1939, with Exhibit "A" attached thereto;

2. Order to show cause directed to Joseph Goldie issued by referee, dated April 3d, 1939, pursuant to said petition;

3. Verified plea of respondent Joseph Goldie objecting to the summary jurisdiction of the above entitled court, and for an order quashing service of order to show cause directed to said respondent as issued by the above entitled court, which verified plea, etc., is dated April 13th, 1939;

4. Transcript of testimony in its entirety, together with a letter dated September 20, 1938, addressed to Herbert Fleishhacker from Joseph Goldie and a letter dated December 31st, 1937, with statement attached from Edward J. Goldie to Mr. E. Mitchell;

5. Petition of Joseph Goldie filed May 12th, 1939, to review order of referee, dated May 5th, 1939;



6. Order of United States District Judge A. F. St. Sure, dated April 26th, 1940, affirming order of referee dated May 5th, 1939;
7. Notice of appeal;
8. Cost bond on appeal;
9. This praecipe.

Dated: May 23d, 1940.

ERNEST J. TORREGANO  
CHARLES M. STARK

Attorneys for appellant  
Joseph Goldie.

[Endorsed]: Filed May 23, 1940. [144]

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[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS  
OF THE RECORD ON APPEAL, RE-  
QUESTED BY STERLING CARR, RE-  
CEIVER FOR THE ESTATE OF HER-  
BERT FLEISHHACKER, THE DEBTOR  
HEREIN.

To the Clerk of the Above Entitled Court:

The following is a designation of additional portions of the record, proceedings and evidence to be contained in the record on appeal in the above entitled matter, as requested by Sterling Carr, Receiver for the estate of Herbert Fleishhacker, the above named Debtor, and the Respondent herein.

1. Certificate and report of Burton J. Wyman,

Referee, on petition for review of order of Referee on objections of Joseph Goldie to Court's jurisdiction to proceed summarily;

2. Receiver's Exhibit No. 1 as of April 21, 1939, being that certain agreement by and between Herbert Fleishhacker (the above named Debtor) and Joseph Goldie, and dated September 29, 1937;

3. Receiver's Exhibit No. 2 as of April 21, 1939, being that certain letter dated September 20, 1938, signed by Joseph Goldie.

Dated: May 29, 1940.

FRANCIS P. WALSH

Russ Bldg.

LOUIS J. GLICKSBERG,

625 Market

Attorneys for Sterling Carr,  
Receiver for the estate of  
Herbert Fleishhacker, Debtor.

[Endorsed]: Filed May 31, 1940. [145]

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District Court of the United States  
Northern District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL**

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 145 pages, numbered from 1 to 145, inclusive, contain a

full, true, and correct transcript of the records and proceedings in the Matter of Herbert Fleishhacker, Debtor, No. 30924 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Twenty-one Dollars and 15/100 (\$21.15) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 18th day of June A. D. 1940.

[Seal]

WALTER B. MALING

Clerk.

E. H. NORMAN

Deputy Clerk.

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[Endorsed]: No. 9553. United States Circuit Court of Appeals for the Ninth Circuit. Joseph Goldie, Appellant, vs. Sterling Carr, Receiver of Estate of Herbert Fleishhacker, Debtor, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed June 18, 1940.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.



In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 9553

In the Matter of

HERBERT FLEISHHACKER,  
Debtor.

DESIGNATION OF POINTS ON WHICH  
APPELLANT INTENDS TO RELY.

To Paul P. O'Brien, Esq., Clerk of the Above Entitled Court and To Sterling Carr, Esq., Receiver of the Estate of the Above Named Debtor, and To Francis P. Walsh, Esq. and Louis J. Glicksberg, Esq., His Attorneys:

You Will Please Take Notice that the appellant in the above entitled appeal hereby adopts as appellant's points on appeal the statement of points on appeal, and each of them, appearing in the transcript of the record on appeal in the above entitled action.

Dated: June 21st, 1940.

ERNEST J. TORREGANO

CHARLES M. STARK

Attorneys for Appellant,  
Joseph Goldie.

Due service of the foregoing notice is hereby admitted this 21st day of June, 1940.

FRANCIS P. WALSH

LOUIS J. GLICKSBERG

Attorneys for Appellee  
Sterling Carr, Receiver  
of the above named Debtor.

[Endorsed]: Filed Jun. 21, 1940.

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[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD CON-  
SIDERED NECESSARY BY APPELLANT  
FOR THE CONSIDERATION OF THE  
ABOVE ENTITLED COURT OF THE AP-  
PEAL PURSUANT TO RULES OF PRAC-  
TICE #19, SUBDIVISION 6.

To Paul P. O'Brien, Esq., Clerk of the Above En-  
titled Court and To Sterling Carr, Esq., Re-  
ceiver of the Estate of the Above Named  
Debtor, and To Francis P. Walsh, Esq. and  
Louis J. Glicksberg, Esq., His Attorneys:

You Will Please Take Notice that as provided in  
the rules of Practice of the above entitled court  
(Rule #19 Subdivision 6) appellant designates as  
the parts of the record considered necessary on said  
appeal the following:

1. All of the transcript of the record received by the clerk of the above entitled court from the United States District Court except the Certificate and Report of Burton J. Wyman, Referee, on petition for review of order of Referee on objections of Joseph Goldie to court's jurisdiction to proceed summarily.

2. The designation of points on which appellant intends to rely.

3. This designation of points of record considered necessary.

Dated: June 21st, 1940.

ERNEST J. TORREGANO

CHARLES M. STARK

Attorneys for Appellant,  
Joseph Goldie.

Due service of the foregoing designation is hereby admitted this 21st day of June, 1940.

FRANCIS P. WALSH

LOUIS J. GLICKSBERG

Attorneys for Appellee,  
Sterling Carr, Receiver of  
the above named debtor.

[Endorsed]: Filed Jun. 21, 1940.



[Title of Circuit Court of Appeals and Cause.]

DESIGNATION BY APPELLEE OF ADDITIONAL PORTION OF RECORD CONSIDERED NECESSARY BY SAID APPELLEE FOR CONSIDERATION BY THE ABOVE ENTITLED COURT OF SAID APPEAL, PURSUANT TO THE RULES OF PRACTICE OF SAID CIRCUIT COURT OF APPEALS.

To Paul P. O'Brien, Esq., Clerk of the Above Entitled Court; and To Joseph Goldie, Appellant Herein; and To Ernest J. Torregano and Charles M. Stark, Esqs., His Attorneys:

You, and each of you, will please take notice that as provided in the Rules of Practice of the above entitled Court (Rule 19, subdivision 6), the Appellee designates as an additional part of the record considered by said Appellee to be necessary on said appeal, the following:

(1) Certificate and Report of Burton J. Wyman, Referee, on petition for review of order of Referee on objections of Joseph Goldie to court's jurisdiction to proceed summarily;

(2) This designation of additional points of record considered necessary by said Appellee.

Dated: June 25th, 1940.

FRANCIS P. WALSH

LOUIS J. GLICKSBERG

Attorneys for Sterling Carr,  
Receiver for the estate of  
Herbert Fleishhacker, Debtor,  
Appellee.

Received a copy of the within this 25th day of  
June, 1940.

TORREGANO AND STARK

Attorneys for Appellant.

[Endorsed]: Filed Jun. 25, 1940.

No. 9553

IN THE

United States  
Circuit Court of Appeals  
For the Ninth Circuit <sup>2</sup>

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JOSEPH GOLDIE,

*Appellant,*

VS.

STERLING CARR, Receiver of Estate of  
Herbert Fleishhacker, Debtor,

*Appellee.*

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BRIEF FOR APPELLEE.

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FILED

SEP 11 1940

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No. 9553

IN THE

United States  
Circuit Court of Appeals  
For the Ninth Circuit

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JOSEPH GOLDIE,

*Appellant,*

vs.

STERLING CARR, Receiver of Estate of  
Herbert Fleishhacker, Debtor,

*Appellee.*

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**BRIEF FOR APPELLEE.**

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**STATEMENT OF FACTS**

On September 29, 1937 a written contract was entered into by and between Joseph Goldie, appellant herein, and Herbert Fleishhacker (Tr. pp. 8-12) whereby the said Joseph Goldie admitted that Herbert Fleishhacker was entitled to receive from him three thousand (3,000) shares of Class "A" common stock of Rainier Brewing Company, Inc., a corporation (Tr. p. 8), and further agreed, within a period of two years



from September 29, 1937, to deliver to Herbert Fleishhacker said 3,000 shares of Rainier Class "A" common stock or its equivalent (Tr. pp. 9, 10 and 11).

The contract further provided that, in order to assure Herbert Fleishhacker of the ultimate delivery to him of said 3,000 shares of Class "A" common stock of Rainier Brewing Company, Inc., Joseph Goldie agreed to pledge to Herbert Fleishhacker five hundred thirty-nine (539) shares of Class "A" 7% Cumulative Preferred stock of Pacific Products, Inc., a corporation (Tr. pp. 8 and 9).

The contract further provided that during the life of said agreement Herbert Fleishhacker should have paid to him all dividends declared and paid upon said 539 shares of Pacific Products, Inc. arising from dividends received by said Pacific Products, Inc. upon stock of Rainier Brewing Company, Inc. held by it, to the extent that Herbert Fleishhacker would receive were he the owner of 3,000 shares of Class "A" common stock of Rainier Brewing Company, Inc.

This agreement was drawn by Charles M. Stark, attorney for Joseph Goldie, the appellant herein (Tr. pp. 62 and 63).

After the execution of this agreement Joseph Goldie refused to deliver to Herbert Fleishhacker said 539 shares of Pacific Products, Inc. Class "A" 7% Cumulative stock as security under the terms of said agreement, or, in lieu thereof, 3,000 shares of Class "A" common stock of Rainier Brewing Company, Inc. (Tr. p. 29).

On September 20, 1938 Joseph Goldie delivered to Herbert Fleishhacker the sum of one thousand eight hundred (1,800) dollars, this being a dividend of sixty cents per share on the 3,000 shares of Class "A" common stock of Rainier Brewing Company, Inc. mentioned in the agreement (Tr. p. 29). On said 3,000 shares Joseph Goldie received the following dividends: October 21, 1937 \$1.30 per share; November 20, 1937 15¢ per share; September 16, 1938 60¢ per share; October 24, 1938 \$1.15 per share. On December 29, 1938 Rainier Brewing Company, Inc. declared an additional dividend of 60¢ per share on said 3,000 shares of stock, payable at the rate of 20¢ per share on January 10, 1939, February 10, 1939 and March 10, 1939. All of such dividend payments were received by Joseph Goldie, but none of them was turned over to Herbert Fleishhacker save and except the said sum of \$1,800 (Tr. pp. 29 and 30). At no time did Joseph Goldie advise Herbert Fleishhacker that it was not his intention to pay him these dividends; on the contrary, every time a dividend was paid, Joseph Goldie affirmed his intention to make the payments to Herbert Fleishhacker (Tr. pp. 32 to 34).

Joseph Goldie claimed an offset of one thousand three hundred ninety-four and 94/100 (1,394.94) dollars against these dividends (see Receiver's Exhibit No. 2, Tr. p. 37). This alleged offset of \$1,394.94 claimed by Joseph Goldie to be due from Herbert Fleishhacker was based upon the following: (a) the sum of one thousand one hundred nineteen and 94/100 (1,119.94) dollars due the Edward J. Goldie Importation Com-

pany, a corporation, which claim of said corporation was never assigned to Joseph Goldie (Tr. pp. 48 to 51); (b) Joseph Goldie claimed that the two hundred eighty (280) dollars constituting the balance of said total claimed offset of \$1,394.94 was owed to him by Herbert Fleishhacker, but that he did not recall what it was for (Tr. p. 57).

On November 23, 1938 Herbert Fleishhacker filed his petition under Chap. XI of the National Bankruptcy Act in the United States District Court at San Francisco, California. Thereafter, and on January 26, 1939 Sterling Carr was appointed Receiver for the estate of Herbert Fleishhacker, Debtor (Tr. pp. 1 and 2).

On April 3, 1939 Sterling Carr, as such Receiver, filed a petition for summary order directed to Joseph Goldie to turn over to the Receiver the 539 shares of Class A 7% Cumulative Preferred stock of Pacific Products, Inc. in accordance with the provisions of said agreement of September 29, 1937, together with the dividends due Herbert Fleishhacker on the 3,000 shares of Class A common stock of Rainier Brewing Company, Inc. in the sum of nine thousand six hundred (9,600.00) dollars (Tr. pp. 1 to 12).

On April 13, 1939 Joseph Goldie filed his verified plea objecting to the summary jurisdiction of the Bankruptcy Court to hear and determine the matter. This plea contained allegations which questioned the validity of the agreement of September 29, 1937 (Tr. pp. 16 to 21).



On May 5, 1939, after a hearing before the Referee on the question of the summary jurisdiction of the Bankruptcy Court, the plea of Joseph Goldie was overruled and he was directed within five days to file his answer on the merits (Tr. pp. 76 to 78).

At no time did Joseph Goldie file his answer as directed by the Referee's order.

Thereafter and on May 12, 1939 Joseph Goldie filed his petition to review the order of the Referee overruling his objections to the jurisdiction of the Bankruptcy Court to proceed summarily (Tr. pp. 78 to 83).

On January 25, 1940 the certificate and report of the Referee on the petition to review was filed with the District Court (Tr. pp. 83 to 162).

On April 26, 1940 the United States District Court made its order affirming and adopting the order of the Referee, in which it was "ordered, adjudged and decreed that the objection of the respondent, Joseph Goldie, to the jurisdiction of this court to proceed summarily upon the Receiver's petition and order to show cause, be, and it is, overruled" (Tr. p. 163).

From that order Joseph Goldie takes this appeal.

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#### QUESTIONS INVOLVED

The questions involved in this appeal are as follows:

1. Has the United States Circuit Court of Appeals for the Ninth Circuit jurisdiction to entertain an appeal from an interlocutory order made in

a controversy arising in proceedings in bankruptcy?

2. Has the Bankruptcy Court the right to proceed summarily against the appellant, Joseph Goldie, who has challenged the court's jurisdiction so to do?

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## ARGUMENT

### I.

THE ORDER OF THE UNITED STATES DISTRICT COURT FROM WHICH THE APPEAL IS SOUGHT TO BE TAKEN IS AN INTERLOCUTORY ORDER MADE IN A CONTROVERSY ARISING IN PROCEEDINGS IN BANKRUPTCY, AND THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT HAS NO JURISDICTION TO ENTERTAIN SUCH AN APPEAL.

Prior to the preparation and filing of this brief, the appellee Sterling Carr as Receiver for the estate of Herbert Fleishhacker, Debtor, filed a motion to dismiss the appeal of the appellant herein, and this brief is filed without prejudice to the right of the appellee to have said motion to dismiss determined by this court. Such motion to dismiss was filed on August 13, 1940 and had not been determined prior to the filing of this brief. Therefore, the appellee again urges said motion and incorporates the same as part of this brief.

Counsel for appellant have stated on page 2 of their brief that the appeal was taken from the order dated April 26, 1940 made by the District Court (Tr. p. 163)

sustaining the order of the Referee overruling appellant's objections to the jurisdiction of that court to proceed summarily against him.

Counsel also set forth on page 2 of their brief that the jurisdiction of the Circuit Court of Appeals is found in the provisions of Secs. 24a and 24b of the Bankruptcy Act. This is a correct statement of the order appealed from, and of the sections of the Bankruptcy Act in which the jurisdiction of the appellate court is stated.

The order of the District Court sustaining the order of the Referee overruling appellant's objection to the jurisdiction of the Bankruptcy Court to proceed summarily against Joseph Goldie, the appellant, is an interlocutory order made in a controversy arising in proceedings in bankruptcy.

*Pearson v. Higgins*, 34 Fed. (2d) 27;

*In re Federal Photoengraving Corporation*, 54 Fed. Rep. (2d) 628, at 629;

*Lieberman v. Bancroft*, 69 Fed. Rep. (2d) 202, at 205 and 206;

*Hoehn v. McIntosh*, 42 A. B. R. (n.s.) 475, at 481; 110 Fed. (2d) 199, at 201;

*Bank of America N. T. S. A. v. Cuccia* (9th C. C. A.), 93 Fed. (2d) 754, at 758.

We submit, under the authority of these cases, that the court, not having jurisdiction to hear this appeal, should grant the motion to dismiss.



## II.

BY REASON OF THE FORM AND SUBSTANCE OF GOLDIE'S WRITTEN OBJECTIONS TO THE COURT'S JURISDICTION, HE HAS WAIVED ANY OBJECTION TO THE JURISDICTION OF THE BANKRUPTCY COURT AND WAS AND NOW IS BEFORE SAID COURT BY A GENERAL APPEARANCE AND FOR ALL PURPOSES:

From an examination of the allegations of said verified objections (Tr. pp. 14 to 21) we find that certain allegations are set out which constitute an answer on the merits, and the court must therefore disregard any objections to the jurisdiction. The allegation set forth in said return which stated "*That upon the refusal of said Anglo California National Bank to deliver to Herbert Fleishhacker three thousand shares Rainier Brewing Company stock referred to hereinabove, the agreement of September 29, 1937 became inoperative and of no force and effect*" (Tr. p. 19) denied that there was a contract in existence between Joseph Goldie and Herbert Fleishhacker. There is no doubt but that these allegations are an answer to the merits and any objection made to the jurisdiction is waived, because they place before the court the question of the validity of the contract and the rights of Herbert Fleishhacker or his Receiver to recover from Joseph Goldie.

The general rule is that a respondent appearing generally and answering on grounds going to the merits of the controversy (the merits of the contract in this case) as well as the jurisdiction of the court,

waives the objection that the court is without jurisdiction of the person or the subject matter.

*Collier on Bankruptcy* (3d ed.) p. 463.

“It is elementary law that neither at law nor in equity can a challenge to the jurisdiction be joined with a defense to the merits. When this is done, the court will disregard the objection to the jurisdiction, and put the defendant to his defense.”

*In re Kornit Mfg. Co.*, 192 Fed. 392, at 395.

This rule is also followed by the United States Supreme Court:

“It is true that where the defendant appears by motion and objects to the jurisdiction and also submits a question going to the merits of the action, it being one of which the court had jurisdiction, there is a general appearance in the case which gives jurisdiction, as in *St. Louis & S. F. Ry. Co. vs. McBride*, 141 U. S. 127, where a demurrer was interposed raising two grounds of jurisdiction and the third going to the merits of the cause of action, and it was held that there had been a submission to the jurisdiction of the court. See also *Western Loan Co. vs. Butte & Boston Min. Co.*, 210 U. S. 368.”

*Big Vein Co. v. Reed*, 229 U. S. 31, at 38, 33 S. Ct. 694, at 696.

“‘If the appearance is a general one, the fact that it is expressly limited by its terms as special does not prevent it from being general, as all

appearances are presumed to be general.' 2 Ruling Case Law, 328.

“ ‘Whether an appearance is general or special does not depend on the form of the pleading filed, but on its substance. If a defendant invoke the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general. There are cases where the defendant may make a quasi appearance for the purpose of objecting to the manner in which he is brought before the court, and in fact to show that he is not legally there at all, but if he ever appears to the merits he submits himself completely to the jurisdiction of the court and must abide the consequences. If he appears to the merits, no statement that he does not will avail him, and if he makes a defense which can only be sustained by an exercise of jurisdiction, the appearance is general, whether it is in terms limited to a special purpose or not.’ Dailey Motor Co. v. Reaves, 184 N. C. 260, 114 S. E. 175, 176.

“ ‘Broadly stated, any action on the part of a defendant, except to object to the jurisdiction over his person, which recognizes the case as in court, will constitute a general appearance.’ 4 Corpus Juris, 1333.

“ ‘There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits.’ Merchants’ Heat & Light Co. v. James B. Clow &



Sons, 204 U. S. 286, 27 S. Ct. 285, 286, 51 L. Ed. 488.”

*Massachusetts Bonding & Ins. Co. v. Concrete Steel Bridge Co.*, 37 Fed. Rep. (2d) 695, at 701.

See also

*St. Louis & S. F. Ry. Co. v. McBride*, 141 U. S. 127, at 130; 35 L. Ed. 659, at 661:

“Assuming that service of process was made, although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was not to raise the question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based on three grounds—two referring to the question of jurisdiction, and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought.”

## III.

BY CALLING WITNESSES AND SUBJECTING THEM TO ORAL EXAMINATION ON HIS BEHALF, JOSEPH GOLDIE WAIVED ANY OBJECTION TO THE JURISDICTION OF THE BANKRUPTCY COURT, AND HE IS NOW BEFORE SAID COURT FOR ALL PURPOSES:

After the attorneys for the Receiver had submitted their case to the Referee, and before a ruling was made by the Referee on the question of jurisdiction, Joseph Goldie through his attorneys called Leon Sloss Jr. and Harry T. Thompson to the stand as his witnesses and subjected them to oral examination. By the examination of Mr. Sloss, who was a Vice-President of the Anglo California National Bank, by the attorneys for Mr. Goldie, the validity of the contract involved in this matter was questioned. In other words, the purpose of the examination was to show that the contract became void and of no effect when the Pacific Products Inc. stock, which was in the possession of said Anglo California Bank could not be transferred (Tr. pp. 60 to 70).

Also, the examination of Harry T. Thompson, an employee of said Anglo California Bank, sought to show that Mr. Fleishhacker never made any effort to obtain the stock of Pacific Products Inc. standing in the name of Joseph Goldie on pledge to the Bank. In addition, in his examination the attorney for Goldie attempted to show that Mr. Fleishhacker owed money to Joseph Goldie (Tr. pp. 65 to 70).

The calling of these witnesses and subjecting them to an examination on behalf of Joseph Goldie raised

a question which asked for relief, that could only be granted on the hypothesis that the court had jurisdiction of Joseph Goldie, and therefore his appearance must be general although there is an attempt to term it "special".

"Participation in the trial of a cause of action by examining and cross-examining witnesses therein amounts to a general appearance, and is a waiver of process."

*Miller v. Prout*, 33 Idaho 709, at 713; 197 Pac. 1023, at 1024;

See also:

*Pittenger v. Al G. Barnes Circus*, 39 Idaho 807, at 811; 230 Pac. 1011;

*Poage v. Cooperative Pub. Co.*, 57 Idaho 561, at 574; 66 Pac. (2d) 1119, at 1125.

"It is well settled that if a party defendant raises any question other than that of jurisdiction or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general, though termed special, and he thereby submits to the jurisdiction of the court as completely as if he had been regularly served with summons. (*Security Loan & Trust Co. v. Boston & South Riverside Fruit Co.*, 126 Cal. 418 (58 Pac. 941, 59 Pac. 296); *Olcese v. Justice's Court*, 156 Cal. 82 (103 Pac. 317).)

"If a party defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially



appear for that purpose only, and must keep out for all other purposes except to make that objection. (Taylor v. Superior Court, 93 Cal. App. 445 (269 Pac. 727).)''

*Burroughs v. Burroughs*, 10 Cal. App. (2d) 750.

The purpose of counsel for appellant in examining these witnesses was an attempt to introduce parol evidence which, if allowed, would vary the terms of a written instrument. This oral testimony was directed to the validity of the contract in question. This being so, a general appearance was made on behalf of Joseph Goldie and any objection to the jurisdiction of the Referee to determine the controversy was waived.

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#### IV.

AT THE TIME HERBERT FLEISHHACKER FILED HIS PETITION UNDER CHAPTER XI, AND ALSO AT THE TIME OF THE FILING OF THE PETITION BY THE RECEIVER FOR A SUMMARY ORDER, JOSEPH GOLDIE WAS AND NOW IS ACTING AS A TRUSTEE OF THE DEBTOR HERBERT FLEISHHACKER:

The agreement provided that Joseph Goldie was to deliver 539 shares of Pacific Products Inc. Class A preferred stock to Herbert Fleishhacker to hold as security for an obligation on the part of Goldie for the delivery of 3,000 shares Rainier Brewing Company stock. The agreement further provided that until Joseph Goldie secured said 3,000 shares of Rainier Brewing Company stock, he was to pay over

to Herbert Fleishhacker any dividends declared upon the 3,000 shares after they had been paid.

“MR. GLICKSBERG: Q. Mr. Goldie, at the time when you executed this agreement, you were the owner of 1,924.4 shares of class A, 7 per cent cumulative preferred stock of Pacific Products, Inc.?

THE WITNESS: A. I believe so, yes.

Q. Did you at any time deliver to Herbert Fleishhacker 539 shares of Pacific Products, Inc., a corporation, class A, 7 per cent cumulative stock? A. No, sir.

Q. As per the terms of this agreement?

A. No, sir.

Q. At no time have you delivered said stock since September 29, 1937, to the present time?

A. No, sir.

Q. Since September 29, 1937, did you deliver any dividends to Mr. Fleishhacker?

A. I believe I did.

Q. And when? A. I haven't the dates.

MR. STARK: Did you say since?

MR. GLICKSBERG: Yes.

MR. STARK: In order to save the court's time, I am willing to stipulate that only one delivery of money has been made by Mr. Goldie following the date of the contract, to Mr. Fleishhacker, which delivery was the sum of \$1,800 on September 20, 1938.

MR. GLICKSBERG: Q. That sum of \$1,800 was delivered on account of dividends due to Mr. Fleishhacker?

THE WITNESS: A. Yes, sir.

Q. Mr. Goldie, on the 3,000 shares of Rainier Brewing Company class A stock set forth in the

agreement you received from the Rainier Corporation on October 21, 1937, \$1.30 per share dividend, did you not.

A. I believe we did. I am not sure, but I think we did.

Q. November 20, 1937, you received a further dividend of 15 cents on the Rainier Class A stock?

A. I think so.

Q. September 16, 1938, you received 60 cents a share dividend, which evidently has been paid by this \$1,800 you testified to? A. Yes.

Q. On October 24, 1938, a further dividend was declared and paid by Rainier Brewing Company in the sum of \$1.15? A. Yes.

Q. On each and every one of the class A Rainier shares? A. I think so.

Q. On December 29, 1938, the Rainier Brewing Company further declared an additional dividend of 60 cents, which was payable at the rate of 20 cents per share on the 10th of January, 1939, the 10th of February, 1939, and the 10th of March, 1939? A. That is correct.

Q. All of those dividends were received by you? A. Yes.

Q. And all the dividends were also received by you of the 3,000 shares of stock due to Mr. Herbert Fleishhacker? A. Yes." (Tr. pp. 28 to 30).

\* \* \* \* \*

"MR. GLICKSBERG: Q. Did you at any time between the 29th of September, 1937, and the present date inform Mr. Fleishhacker that you were indebted to Mr. Fleishhacker for the dividends set forth?



THE WITNESS: A. I believe so.”

\* \* \* \* \*

“Q. May I repeat the question, Mr. Goldie: Did you at any time have any discussion with Mr. Fleishhacker referring to the question of dividends, your failure to make payment?

A. Yes, we talked about it every time a dividend was paid.

Q. You mean you talked to Mr. Fleishhacker about October 21, 1937, about the dividend?

A. I don't remember the date exactly when I talked to him, but I presume every time there was a dividend, we talked to each other about it.

Q. Did you at any time in these conversations tell Mr. Fleishhacker that you were not going to pay those dividends to Mr. Fleishhacker?

A. No, no.

Q. Is it not a fact that every time you have affirmed your intention to make these payments to Mr. Fleishhacker? A. Yes, sir.

Q. Is it not also a matter of fact that you communicated with Mr. Fleishhacker and told him that you were indebted to Mr. Fleishhacker for these various dividend payments to you?

MR. STARK: Just a minute. Are you referring to a written communication now, Mr. Glicksberg?

MR. GLICKSBERG: I am asking; that is up to the witness.

THE WITNESS: A. I don't believe there ever was any written communication; it was all verbal.

Q. All verbal? A. Yes.” (Tr. pp. 31 to 33).

This testimony on the part of Joseph Goldie shows that he was holding dividends which belonged and

were due to Mr. Fleishhacker under the terms of the contract. One of the fundamental rules of law is that every person who receives money to be paid to another, or to be applied to a particular purpose, is a trustee.

*Woodmansee v. Schmitz*, 232 N.W. 774 at 775;  
202 Wis. 242 at 246.

Property in the hands of a trustee of the Debtor under the protection of the Bankruptcy Act is constructively in the possession of such Debtor, hence is subject to the summary jurisdiction of the court.

“By the Act of 1898, as originally enacted, the power of the bankruptcy court to adjudicate, without consent, controversies concerning the title, arising under either Section 67e or Section 60b, or Section 70e, was confined to property of which it had possession. The possession, which was thus essential to jurisdiction, need not be actual. Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the trustee; where the property was delivered to the trustee, but was thereafter wrongfully withdrawn from his custody; *where the property is in the hands of the bankrupt's agent or bailee; where the property is held by some other person who makes no claim to it; and where the property is held by one who makes a claim, but the claim is colorable only. As every court must have power to determine, in the first instance, whether it has jurisdiction to proceed,*

*the bankruptcy court has, in every case, jurisdiction to determine whether it has possession actual or constructive. It may conclude, where it lacks actual possession, that the physical possession held by some other persons is of such a nature that the property is constructively within the possession of the court."*

*Taubel v. Fox*, 264 U. S. 426, at 432-3; 44 S. Ct. 396 at 398 and 399.

"But property held or acquired by others for account of the bankrupt is subject to a summary order of the court which may direct an accounting and the payment over to the trustee or receiver appointed by the Bankruptcy Court."

*May v. Henderson*, 268 U. S. 111, at 115; 45 S. Ct. 456, at 458.

With the unqualified admission by Joseph Goldie that these dividends belonged to Herbert Fleishhacker, and that he always advised Herbert Fleishhacker that they belonged to him, the Bankruptcy Court would be helpless indeed if it did not have power to compel Joseph Goldie to turn over these dividends, after he admitted that they rightfully belonged to Herbert Fleishhacker.

"In other words, the question reduces itself to this: Has the bankruptcy court the power to compel the bankrupt, or his agent, to deliver up money or other assets of the bankrupt, in his possession or that of someone for him, on petition and rule to show cause? *Does a mere refusal by the bankrupt or his agent so to deliver up oblige*



*the trustee to resort to a plenary suit in the Circuit Court or a state court, as the case may be?*

*“If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and, in many respects, rendered practically inefficient.*

*“The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law.*

\* \* \* \* \*

*“The position now taken amounts to no more than to assert that a mere refusal to surrender constitutes an adverse holding in fact and therefore an adverse claim when the petition was filed, and to that we cannot give our assent.”*

*Mueller v. Nugent*, 184 U. S. 1, at 14, 15.

See also:

*Chicago Board of Trade v. Johnson*, 264 U. S. 1; 44 S. Ct. 232.

Also, the Federal Courts have held that a debt due a bankrupt estate is so far constructively in the trustee's possession as to give the Bankruptcy Court jurisdiction to determine the rights of the parties to it.

*Orinoco Iron Co. v. Metzel*, 230 Fed. 40, at 45;  
*In Re Ransford*, 194 Fed. 654, at 658.

Indeed, it would be a strange situation if the Referee in Bankruptcy sitting as a Judge of the Bankruptcy Court, could not order Joseph Goldie to turn over dividends to the Receiver or Herbert Fleishacker, when in his own testimony he admits that he owes the dividends in question to Herbert Fleishacker.

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## V.

**THE ALLEGED ADVERSE CLAIM OF GOLDIE IS UNSUBSTANTIAL AND OBVIOUSLY WITHOUT COLOR OF MERIT, AND IS A MERE PRETENSE, AND THE REFEREE SHOULD PROCEED IN A SUMMARY MANNER AND ADJUDICATE THE MATTER IN FAVOR OF THE RECEIVER:**

Counsel for appellant in his brief has set out several cases holding that the Bankruptcy Court has no jurisdiction to proceed in a summary manner if the adverse claim is real and substantial. We have no quarrel with the principle laid down by these cases, but wish to call the court's attention to the fact that such cases go further and state that if the so-called adverse claim is merely colorable, the court may then proceed to adjudicate the merits summarily.

The cases cited do not give a clear definition of the test to be applied in determining whether an adverse claim is substantial, or merely colorable. At this time we wish to call the court's attention to a quotation from a leading case on this point, decided by the

U. S. Supreme Court and which very clearly defines this illusive proposition:

*Harrison v. Chamberlin*, 271 U. S. 191, at 194;  
46 S. Ct. 467:

“Without entering upon a discussion of various cases in the Circuit Courts of Appeals in which divergent views have been expressed as to the test to be applied in determining whether an adverse claim is substantial or merely colorable, we are of the opinion it is to be deemed of a substantial character when the claimant’s contention ‘discloses a contested matter of right, involving some fair doubt and reasonable room for controversy’, (citing *Board of Education v. Leary*, 236 Fed. 521 at 524), in matters either of fact or law; and is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously without color of merit, and a mere pretense.”

The evidence adduced at the hearing before the Referee showed two things that in our opinion conclusively indicate that the alleged adverse claim of Goldie is merely colorable and is made in bad faith and without any legal justification; viz. (a) Goldie admits that he entered into the contract with Herbert Fleishhacker and agreed to deliver to him 539 shares of Pacific Products Inc. Class A 7% cumulative stock; the contract further shows that Goldie agreed to pay to Herbert Fleishhacker the dividends declared on 3,000 shares Rainier Brewing Company Class A stock. Goldie further testified that pursuant to that contract,



he received all of the dividends claimed by the Receiver on behalf of the Debtor on the 3,000 shares due to Herbert Fleishhacker (Tr. p. 30). (b) He also admitted paying to the Debtor \$1,800 on account of those dividends. If that testimony is not sufficient to show that his adverse claim is merely colorable, we only have to call the court's attention to Receiver's Exhibit No. 2, which is a letter written by Joseph Goldie to the Debtor, Herbert Fleishhacker, on September 20, 1938, where he admits in writing that the dividends on the stock are due to Mr. Fleishhacker.

With this evidence in mind, two things must be admitted. *First*, the execution of the contract by Mr. Goldie, which was prepared by his own attorney, Mr. Stark, and *second*, the payment of certain moneys on account of the dividends required to be paid under this contract. If the contract is valid for one purpose, it is valid for all purposes, and Goldie without question is bound to pay to the Debtor the dividends on the 3,000 shares when the same are paid to him by the Rainier Brewing Company.

These undisputed facts show that Goldie's refusal to turn over to the Receiver the dividends received by him on the said 3,000 shares, is without merit and brings this proceeding within the rule laid down in the case of

*Marcell v. Engebretson*, 74 Fed. (2d) 93, at 97:

“The court is not ousted of its jurisdiction by the mere assertion of any adverse claim; but, having the power in the first instance to deter-

mine whether it has jurisdiction to proceed, the court may enter upon a preliminary inquiry to determine whether the adverse claim is real and substantial or merely colorable. *And if found to be merely colorable the court may then proceed to adjudicate the merits summarily*; but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceedings.” (Citing cases.)

Goldie admits that he owes the money to Fleishhacker which is represented by the dividends paid to him on the 3,000 shares of stock, and therefore under the case of

*Orinoco Iron Co. v. Metzel*, supra,

the court has summary jurisdiction in this matter, because a debt due the bankrupt estate is so far constructively in the trustee’s possession as to give the Bankruptcy Court jurisdiction to determine the rights of the parties to it. Opposing counsel attempt to escape the rule laid down in the *Orinoco Iron* case by contending that Goldie has a legitimate offset to the claim for dividends, in the sum of \$1,394.94 and that therefore a real dispute exists between Joseph Goldie and Herbert Fleishhacker. The testimony of Goldie on the hearing does not substantiate this contention, for the evidence shows a debt not in favor of Mr. Goldie in the sum of \$1,119.94 but in favor of the Edward J. Goldie Importation Company, a corporation, and a separate and distinct entity. This attempt to show a real dispute fell flat when Mr. Goldie upon examination by Mr. Glicksberg showed that the Edward J.

Goldie Importation Company was a corporation and that said corporation did not at any time assign its claim to Mr. Goldie (Tr. pp. 50 and 51).

As to the balance of the \$1,394.94, viz. “\$275 or \$300”, Mr. Goldie attempted to testify that it arose as far back as 1933 or 1934; what it was for, he did not recall. See Tr. p. 48, which contains the following testimony of Joseph Goldie:

“MR. GLICKSBERG: Q. Mr. Goldie, with reference to this offset of \$1,394.94, what was that due to you from Mr. Fleishhacker for?

A. That was due me in a settlement for some cash money that he owed to the Edward J. Goldie Importation Company, which I took over.

Q. When was this settlement had?

A. That was just part of it and the other was something else. I don't recall, \$275 or \$300. I haven't the other item. This went back as far as 1933 or 1934 that he owed that for.”

We submit that the attempt of Goldie to show that he had a substantial adverse claim was without merit, and that the court should hold that the Referee has summary jurisdiction in this matter.

*May v. Henderson*, 268 U. S. 111, at 115 and 116; 45 S. Ct. 456, at 458:

“Courts of bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of an adverse claim. The court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the summary remedy is an appropriate one within the prin-



ciples of decision here stated (citing cases). *It may disregard the assertion that the claim is adverse if on the undisputed facts it appears to be merely colorable.*”

See also

*First National Bank of Negaunee v. Fox*, 111 Fed. (2d) 810, at 813.

“It is inaccurate to say that the court in all cases lacks jurisdiction over the subject matter. The objection to summary procedure does not go to the basic jurisdiction of the court but to its authority to proceed in a summary way. The power over a bankrupt’s estate, like that of any other proceeding in rem, depends primarily on actual custody. Having acquired possession of the res, it may award it to its lawful owner. However, the court’s control is not limited to property of which it has actual custody through its officers, but it may also seize summarily other property said to be ‘constructively’ in its possession at the time the petition is filed. *This incidental power includes property in the possession of one who acknowledges he holds it subject to the bankrupt’s demand or under an adverse claim which is patently absurd or made in bad faith or merely colorable.* *Mueller v. Nugent*, 184 U. S. 1, 18, 22 S. Ct. 269, 46 L. Ed. 405; *Babbitt v. Dutcher*, 216 U. S. 102, 115, 30 S. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; *Tauble, etc., Co. v. Fox*, 264 U. S. 426, 433, 44 S. Ct. 396, 68 L. Ed. 770; *May v. Henderson*, 268 U. S. 111, 116, 45 S. Ct. 456, 69 L. Ed. 870.

“The determination of jurisdiction to dispose summarily of the question of title to property to which a claim is asserted against that of the bankrupt when such jurisdiction is not consented to will depend upon the nature and validity of such claim. If the property belongs unquestionably to the bankrupt’s estate, the court may take possession of it summarily. The mere assertion of an adverse claim is not enough to oust the court of its summary jurisdiction.”

If the claim be unsubstantial as a matter of law, and has no basis in possession, summary jurisdiction exists.

*Ex parte Benevolent and Protective Order of Elks*, 69 Fed. (2d) 816.

We submit that under the facts and the law, Goldie’s alleged adverse claim is unsubstantial, and fails to disclose a matter of right which involves no fair and reasonable doubt and which would leave no room for controversy. Therefore the Bankruptcy Court has jurisdiction in this matter.

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#### COMMENTS ON APPELLANT’S BRIEF.

Practically all of appellant’s brief is devoted to criticism of the Referee’s certificate on review and the cases cited therein. Counsel for appellant have cited only five or six cases which they contend support their position. Upon an examination of these cases we find that they are in no way controlling.

They cite only general rules—with which we have no quarrel. Great weight is laid on the case of

*Goldstein v. Moseson* (CCA 7th Cir.), 32  
A. B. R. 802; 216 Fed. 887,

and the companion case of

*Goldstein v. Moseson* (CCA 7th Cir.), 32  
A. B. R. 804; 216 Fed. 889.

Briefly, the facts in these cases are as follows:

Goldstein and Moseson were adjudicated bankrupts on an involuntary petition. Six days before the involuntary petition was filed the bankrupts transferred goods amounting to \$8,375.00 to Benjamin Bros. without consideration. The trustee filed a petition for summary order against Benjamin Bros. who filed verified answers objecting to the jurisdiction, denying that they had received the goods as agents or bailees of the bankrupts, and further alleging that prior to the bankruptcy proceedings they bought and paid for the goods. Upon the hearing the Referee held that the Bankruptcy Court had summary jurisdiction to hear and determine the matter. The District Court affirmed the order of the Referee and Benjamin Bros. petitioned the Circuit Court of Appeals to review and revise the order. The appellate court reversed the order with direction to dismiss the summary proceeding, the court holding as follows:

“As the claim of Benjamin Bros. was ‘based upon a transfer antedating the bankruptcy’, it belonged to the class of cases requiring a plenary suit, *unless the claim was merely colorable*.



“The District Court may pursue the summary method to the point of ascertaining that the alleged adverse claim is substantial and not merely colorable. But substantiality appears as soon as the claimant, in response to the rule to show cause, presents his verified answer, which is unmet by the trustee, or which, if met by a replication, is supported by sworn testimony of facts which, if true, would show title and possession antedating the petition in bankruptcy.”

We have no quarrel with the rule laid down by these cases. They completely support our position. In the instant case the Referee pursued the summary method and ascertained that the alleged adverse claim of Goldie was unsubstantial and obviously without color or merit, and a mere pretense (see *Harrison v. Chamberlin*, supra). Admitting for the purpose of this discussion that all of the testimony introduced, or attempted to be introduced, by Goldie was true, it would not change the unsubstantiality of Goldie's claim. He admits the execution of the agreement; that under its terms he is obligated to deliver 3,000 shares of Rainier Brewing Company Class A stock; that he is obligated to pay over to Herbert Fleishhacker the dividends on said stock; that he has already paid to Herbert Fleishhacker certain dividends, and that he owes Herbert Fleishhacker other dividends declared and paid on said stock; that at all times he admitted that he owed the dividends to Herbert Fleishhacker and would pay them over to him (Tr. pp. 30 to 33).

Also we must keep in mind that none of the cases cited by appellant supports his contention. They merely cite the general rule and hold without exception that if the claim of the one objecting to the summary jurisdiction is unsubstantial and without merit, the Bankruptcy Court has jurisdiction. In none of the cases cited by appellant did the parties ask the Bankruptcy Court to pass on the validity of a written agreement or seek any other relief which would require the court to pass on the merits.

On pp. 15, 16 and 17 of appellant's brief there was quoted a portion of the opinion in

*In re Kornit Manufacturing Co.*, 192 Fed. 392,  
at 395.

We wish to call the court's attention to a portion of the opinion which is quoted on page 16 of the brief, as follows:

"\* \* \* as far as Graves is concerned, he not having presented any claim to the referee nor in any way submitted himself to the court's jurisdiction, were it not for the fact that *their answers go to the merits of the controversy. By doing this, respondents are estopped from questioning the court's jurisdiction over them. It is elemental law that neither at law nor in equity can a challenge to the jurisdiction be joined with a defense to the merits. When this is done, the court will disregard the objection to the jurisdiction and put the defendant to his defense.*"

This portion of the opinion is a complete answer to any contention made by appellant, to wit, when the court states that Graves could not object to the jurisdiction of the Bankruptcy Court because his answer went to the merits of the controversy, and that by doing so he was estopped from questioning the court's jurisdiction over him.

Counsel also cite

*In re Midtown Contracting Co.*, 39 A. B. R. 578;  
243 Fed. 56.

On p. 25 of their brief they quote a portion of the opinion in this case as follows:

“The courts have held in numerous cases that a stranger to the proceedings in bankruptcy who sets up an adverse title to property which is claimed by the trustee as assets of the bankrupt, cannot be compelled to submit his claim to adjudication in a summary proceeding in the court of bankruptcy *provided his claim is made with the apparent intention of defending it in good faith, and is not merely colorable*, but is entitled to be heard in a plenary suit.”

We wish to call the court's attention to the fact that this portion of the opinion sustains our contention, to wit, that a person cannot object to the summary jurisdiction of the Bankruptcy Court where his claim is merely colorable and without merit.



**CONCLUSION.**

In conclusion, appellee respectfully submits that since the order of the United States District Court from which the appeal is sought to be taken is an interlocutory order made in a controversy arising in proceedings in bankruptcy, the United States Circuit Court of Appeals has no jurisdiction to entertain such appeal and the same should be dismissed.

It is further respectfully submitted that in the event this court holds that it has jurisdiction to entertain such appeal, under the facts and the law as above set forth the Bankruptcy Court has jurisdiction in this matter, and therefore the order of the Referee overruling the objections of appellant to the summary jurisdiction of the Bankruptcy Court, which order was affirmed by the District Court, should not be disturbed.

Respectfully submitted.

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No. 9553

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 3

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JOSEPH GOLDIE,

*Appellant,*

vs.

STERLING CARR, Receiver of Estate of  
Herbert Fleishhacker, Debtor,

*Appellee.*

REPLY BRIEF FOR APPELLANT.

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FILED

SEP 26 1940

PAUL P. O'BRIEN,  
CLERK





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# United States Circuit Court of Appeals

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JOSEPH GOLDIE,

*Appellant,*

vs.

STERLING CARR, Receiver of Estate of  
Herbert Fleishhacker, Debtor,

*Appellee.*

## REPLY BRIEF FOR APPELLANT.

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After the case at bar was docketed in the above entitled court, appellee filed a notice of motion to dismiss the appeal herein. This motion has not been passed upon as yet, it having been set forward for hearing at a later date by Senior Circuit Judge Wilbur.

It is the intention of the court, we assume, to pass upon the motion to dismiss contemporaneously with the consideration of the appeal. We will, therefore, make our argument opposing appellee's motion to dismiss in this, our reply brief, especially as appellee has elected to brief this point in his brief under Caption I of his Argument. (Appellee's brief, page 6.)



## I.

THE ORDER OF THE DISTRICT COURT APPEALED FROM WAS INTERLOCUTORY ONLY IN PART. IT IS FINAL AS TO THE REFEREE'S HOLDING THAT:

“Said respondent [appellant], at the time of the filing of the petition by the debtor herein, and also at the time of the filing of said petition by said receiver [the receiver's petition for an order to show cause directed to appellant], was and now is acting as a trustee of said debtor.” (Record page 76.)

“Joseph Goldie, at the time of the filing of the petition by said debtor and also at the time of the filing of said petition by said receiver [the receiver's petition for an order to show cause directed to appellant], was and now is indebted to the debtor . . .” (See referee's opinion, findings, conclusions and order, Record page 76.)

From the foregoing findings the referee reached conclusions of law which were without opinion affirmed by the District Court, one of such conclusions being:

“That the receiver is entitled to proceed summarily herein against said respondent, Joseph Goldie, *a trustee of said debtor.*” (Emphasis ours.)

It may be seen from the foregoing that the referee found as a fact that appellant was indebted to the debtor, and concluded as a matter of law that appellant was acting as a trustee for said debtor, these findings and conclusions being in addition to his

finding that the bankruptcy court had summary jurisdiction over appellant.

True, the referee held that appellant might offer such further competent evidence on the merits as appellant might be desirous of offering and proffered the process of the court to appellant to produce such evidence.

But such process or evidence will avail appellant nothing to show that he was not, in fact, a debtor of the estate of Mr. Fleishhacker, and will avail him nothing to show that he is not nor ever was a *trustee* for Mr. Fleishhacker for the questions both as to fact and law were decided adversely to him in the order here appealed from.

The case upon which appellee so heavily leans to support his contention that this court cannot entertain this appeal is that of *Pearson v. Higgins*, 34 Fed. (2d) 27, 14 Am. B. R. (N. S.) 386. Attorneys for the appellee in that case are the same as for appellant in the case at bar.

This court, on petition for rehearing in the *Pearson* case, said:

“By petition for rehearing, it is contended that we erred in impliedly holding or assuming that no ‘turn over’ order had been made . . .

“The action taken by the referee, and affirmed by the district judge, we do not think was intended to have such effect, nor from the oral argument did we get the impression that counsel for the appellants otherwise construed the record.

But owing to the failure to enter any formal order, we find, upon further examination, that the record exhibits a measure of confusion and uncertainty . . .

“Upon the record as made, the referee might properly have taken the appellants’ announcement of intention to petition for a review as an implied declaration that they intended to stand on their plea, and entered such a turnover order as by default; but in his certificate to the district judge on petition for review he disclaimed any intention to adjudicate the merits of the claim of title . . .

*“However, because of the confusion and uncertainty and to protect the parties against the possible injustice which might result therefrom, we choose to entertain the question raised by the ruling on the plea to jurisdiction.”* (Italics ours.)

We respectfully submit that in the case at bar the referee and the district judge affirming him went far in excess of a simple ruling on appellant’s objection to the jurisdiction of the bankruptcy court to proceed summarily, for in addition to overruling the plea to the court’s jurisdiction, the referee held (and was affirmed by the district judge) that not only did the court have summary jurisdiction over appellant but that appellant was indebted to Mr. Fleishhacker and, in addition, was Mr. Fleishhacker’s trustee, closing the door thereby to the right of appellant upon a hearing on the merits to show that he was neither indebted to Mr. Fleishhacker nor was he in any sense a trustee of Mr. Fleishhacker.



There was no issue before the trial court except the one of jurisdiction, or the lack of it, and the effect of the referee's order, if affirmed, would be to deprive appellant of the major parts of his meritorious defense, to-wit, the existence of a trust with appellant the trustee and the existence of a debt with appellant the debtor.

From the present state of the record, if this court holds that summary jurisdiction is lacking, the appellee, receiver, still has his full remedy in a court of plenary jurisdiction and appellant has his day in court controlled by the rules of orderly legal procedure.

On the other hand, if this court affirms the order of the referee and District Court, two findings of the referee on the *merits* of appellant's case are thereby adjudicated against him.

We respectfully urge that the motion to dismiss the appeal herein should be denied on the grounds that the referee's order was more than interlocutory and attempted to adjudicate substantially meritorious elements of appellant's defense.

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#### POINT II OF APPELLEE'S ARGUMENT.

This contention of the appellee is extremely novel.

Appellant is haled into court on the process issued on appellee's petition. Objection to the court's jurisdiction is made and the facts disclosing the lack of jurisdiction are pleaded so as to permit the inquiry

as to jurisdiction or the lack of it to be held and with a prayer that service of the process be quashed.

Appellee, with earnestness if not conviction, asserts that this manner of raising the point waives the very right sought to be invoked by appellant.

We call the court's attention to the failure of appellee to even attempt an answer to the case of *Bake-Rite Consolidated*, 6 Am. B. R. (N. S.) 503, 12 Fed. (2d) 648, cited and quoted from in our opening brief, which case clearly and effectively disposes of this point adversely to appellee's contention.

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### POINT III OF APPELLEE'S ARGUMENT.

Brought into court on an order to show cause issued pursuant to an ex parte petition of the appellee herein, appellant filed an objection to the court's jurisdiction over him.

The appellee introduced evidence on which he relied to disclose the presence of summary jurisdiction. Appellant introduced evidence on which he relied to disclose the lack of summary jurisdiction over him.

This act of appellant (introducing evidence through witnesses) appellee asserts was a waiver of the objection of appellant to the court's summary jurisdiction. But Judge Kerrigan said, in *Bake-Rite Consolidated*, *supra*:

“In determining that question [of jurisdiction] it may be necessary *to examine into the merits of the controversy*. (Citing cases.)” (Emphasis ours.)

Assuming that Judge Kerrigan's statement in the case just quoted is a correct statement of the law, how then would appellee have such an examination conducted? Must appellant Goldie, with vital and substantial rights at stake, be an actor without a line to speak? A litigant without voice? The star chamber might as well become a part of our legal procedure as to give judicial sanction to such a doctrine.

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#### POINT IV OF APPELLEE'S ARGUMENT.

On this point appellee states that at the time Herbert Fleishhacker filed his petition under Chapter XI and also at the time of the filing of the petition by the receiver for a summary order against appellant, appellant was and now is acting as trustee of the debtor, Herbert Fleishhacker. The corporate stock of Rainer Brewing Company and its dividends which the receiver seeks to summarily seize through an order against appellant has not been in the possession of appellant, either actively or constructively, since the year 1933 (Record page 61), long antedating the debtor's petition herein. In 1933, this stock was pledged by appellant to the Anglo California National Bank and there it has since remained.

Following the making of the contract of September 29th, 1937, a joint effort was made by appellant and Mr. Fleishhacker to obtain a release from pledge of the three thousand (3000) shares of this stock and deliver it to Mr. Fleishhacker. In this effort they failed. The pledgee bank refused to release the stock



although requested to do so by both the appellant and Mr. Fleishhacker. At the time Mr. Fleishhacker's petition in bankruptcy was filed Mr. Fleishhacker was not in possession, either actively or constructively, of this stock and, as said above, neither was Mr. Goldie. It was in the possession of Mr. Goldie's pledgee, the Anglo California National Bank, where it is today.

The pledgee bank is not a party to the proceedings in the case at bar and any final order made herein against Goldie in the summary proceeding at bar could not affect the pledge or the rights of the bank to the pledged property. (Record page 61.)

It is apparent from the foregoing statement of fact, which will not be disputed, that the assertion in Point IV of appellee's brief that Mr. Goldie was acting as trustee for the debtor, in so far as it relates to the stock certificates themselves, cannot be true. The existence of a trust presupposes that Joseph Goldie has the possession of the stock and that the ownership of it is in Mr. Fleishhacker.

As we have shown above, the possession of the stock is in the pledgee bank, which is not a party to the proceedings at bar.

The citation of the general principles of law contained in appellee's brief under Point IV can lend no aid to the court in the determination of the question as to whether or not summary jurisdiction exists in the bankruptcy court to require the delivery by Joseph Goldie of this stock and its dividends over to the receiver.

The United States Circuit Court of Appeals for the Second Circuit as recently as July 15, 1940, in the *Matter of Richard Whitney et al., Bankrupts*, 43 Am. B. R. (N. S.) 158, 113 Fed. (2d) 426, held squarely on the point that where there is a relationship of trust between the bankrupt and a third party the bankruptcy court did not have summary jurisdiction to determine the rights of the trustee in bankruptcy and the trustee under the trust. In that case, the Circuit Court of Appeals said:

“The interest of the beneficiary of a trust who becomes a bankrupt is not treated as an ordinary chose in action and regarded as in the constructive possession of the bankruptcy court, but the trustee who holds a res on behalf of the bankrupt is classed as an adverse claimant.”

In the last paragraph, at page 20 of appellee's brief, on this point, appellee does an about-face from his assertion that Goldie is acting as the debtor's trustee and states primarily that there is a debt due the bankrupt estate from Goldie. To say that Goldie is the trustee for the debtor estate in one breath and that he is its debtor in another is self-contradictory. If Mr. Goldie is acting as trustee for the bankrupt estate there is no relationship of debtor and creditor. If he is the debtor of the bankrupt estate, there is no relationship of trust. But in support of this assertion that the bankruptcy court has summary jurisdiction over Mr. Goldie to require him to pay a debt to the bankrupt estate, the appellee has again cited, as the referee did in his certificate,



*Orinoco Iron Company v. Metzel*, 230 Fed. 40. The *Orinoco Iron Company* case does not lay down the rule of law which the appellee states it does. It holds simply that where there is a controversy between two persons, the bankruptcy trustee and another, each claiming an ownership of an account receivable, the bankruptcy court has summary jurisdiction to determine which of these two persons is the actual owner. The person from whom the fund was to be collected made absolutely no claim to it. It is, therefore, readily apparent that this case is not authority for the assertion of appellee that accounts receivable or choses in action are collectible by summary action in the bankruptcy proceeding. The rule is just the contrary, as we will show.

In the *Orinoco* case, *supra*, the United States was the debtor and the litigation was between two other persons one of whom was the trustee in bankruptcy claiming the fund held by the United States. The United States made no claim to the fund and the bankruptcy court was held to have summary jurisdiction over the persons who did claim it, one of whom was an officer of the bankruptcy court, to determine to which one of these the fund was payable, the United States being ready to pay it to either of them.

The second case cited by appellee in support of the foregoing proposition is *In re Ransford*, 28 Am. B. R. 78, 194 Fed. 654 at 658. Neither does this case support the rule of law for which it is cited in appellee's brief. There it was held:

“The proceeding in the District Court was a controversy between the trustee in bankruptcy and



the petitioner as to which was entitled to receive payment from the garnishee defendant of the indebtedness primarily owing to the bankrupt's estate. The rights of a garnishing creditor can be no greater than those of an attaching creditor and if the rights of the latter are voided by the bankruptcy proceedings the same must be true of those of the former . . .

“We think, for the purposes of this suit, the debt should be regarded as constructively in his possession and that the District Court had jurisdiction to proceed summarily to determine the rights of the parties.”

The *Ransford* case, in like manner as the *Orinoco* case, simply holds that where the third person makes no claim that as between two others claiming, one of whom is a trustee, the obligation is constructively in the possession of the trustee and its ownership may be summarily determined. Neither of these cases holds, as between an officer of the bankruptcy court as the creditor, on the one hand, and an asserted debtor, on the other hand, that the bankruptcy court has summary jurisdiction over the debtor. The opposite is the settled law.

In the *Matter of W. R. Ballou*, 33 A. B. R. 21, 215 Fed. 810, was a case where a summary proceeding was instituted to require the delivery by a third person of corporate stock in a corporation to a trustee in bankruptcy. The respondent to the order to show cause in that case was in exactly the same position as the appellant in the case at bar, except that in the

*Ballou* case the respondent did not raise the question of the referee's jurisdiction until after an order on the merits adverse to him had been made. The District Court on review said:

"I am, however, clear that the referee had no jurisdiction of the proceeding and that it is not now too late to raise the question. This was not a case for a summary proceeding. A summary proceeding is proper only to effect the transfer of the physical possession of property from the bankrupt or a third person to the trustee. *It is not proper to enforce the performance by a third person of a contract with the bankrupt. An undisputed debt due the bankrupt cannot be collected by a summary proceeding. It can only be collected by an independent suit brought by the trustee against the debtor in a court of competent jurisdiction.*" (Italics ours.) ". . . No instance can be found, I dare say, where the payment of a debt due or the specific performance of a contract with the bankrupt has been enforced in any such way."

And, similarly, in the *Matter of Borok*, 18 Am. B. R. (N. S.) 271, at 274, 50 Fed. (2d) 75:

"Where the trustee attempted to collect the accounts from the bankrupt's debtors he would have to resort to a plenary suit; he could not claim to be in 'possession of the property' for the existence of the property, i. e., a valid chose in action, is the issue in dispute."

And, as said by the Ninth Circuit Court of Appeals in *E. C. Street, as trustee, etc. v. Pacific Indemnity Company*, 22 Am. Br. (N. S.) 171, 61 Fed. (2d) 106:

“It, therefore, becomes necessary to determine the status of the money herein involved at that time, namely, October 8th, 1929. If, at the time of the filing of the petition in bankruptcy the appellee [Pacific Indemnity Company] had been in possession of the moneys which are now in its possession, there would be no question but that there would be no summary jurisdiction in the bankruptcy court in regard thereto. However, the possession of the moneys was not given to appellee until after the petition had been filed.”

In the case at bar, Mr. Fleishhacker's receiver makes no contention that he was ever in possession of any of the Rainier stock, which is the subject matter of the action, nor will he contend that he was ever in possession of any of the dividends paid on that stock. The sole basis for his assertion of the existence of the summary jurisdiction in the bankruptcy court is found in the contract between appellant and Mr. Fleishhacker, in which appellant agrees to do certain acts in relation to this stock and its dividends, but as we have seen in the *Matter of Ballou*, supra, the specific performance of a contract is not a proper subject matter of summary jurisdiction and as seen in the *Matter of Borok*, supra, although said by way of *dicta*, the collection of a debt due to Mr. Fleishhacker from Mr. Goldie is not properly the subject of summary jurisdiction.



## POINT V OF APPELLEE'S ARGUMENT.

The fifth and final point made by appellee is to the effect that Mr. Goldie's asserted adverse claim to the stock and dividends is mere pretense, a sham and without color of merit. Without commenting upon the success of appellee's attorneys in shutting off, by objection at every turn, the efforts of appellant to disclose the nature of the adverse claim to the trial referee, it appears that insubstantiality is claimed by appellee for two reasons: (1) that more than a year antedating the bankruptcy proceeding appellant entered into a written contract with Mr. Fleishhacker; (2) that on September 20, 1938, more than a year antedating the bankruptcy proceeding, appellant paid to Mr. Fleishhacker one thousand eight hundred dollars (\$1800.00) as part of the dividends arising on the suit referred to in the contract.

From these two facts appellee argues that appellant's asserted adverse claim and his raising of the objection to the summary jurisdiction of the bankruptcy court was sham, mere pretense and without color of merit and that his asserted right to have a determination of his obligations in a plenary proceeding is unsound. But the cases hold that if the cause of action is the establishment of a debt due the bankrupt from a third person the summary jurisdiction does not lie,

*Matter of Borok, supra;*

*Matter of Ballou, supra.*

And that it is not proper to enforce by summary proceeding the performance of a contract by a third person,

*Matter of Ballou*, supra.

And where the uncontradicted testimony shows that the res is in the hands of persons other than the bankrupt summary jurisdiction does not lie.

*Matter of Markel*, 35 Am. B. R. 318, 228 Fed. 926.

And although the claim may ultimately prove false and fraudulent, still summary jurisdiction to determine this fact does not lie.

*Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405, 22 Sup. Ct. 269, 7 Am. B. R. 224.

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#### CONCLUSION.

“The opinion seems to have been quite prevalent in many quarters at one time, that the moment a man is declared bankrupt, the District Court, which has so adjudged, draws to itself by that act not only all control of the bankrupt’s property and credits, but that no one can litigate with the assignee contested rights in another court, except in so far as the Circuit Courts have concurrent jurisdiction, and that all courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause,

and to dispose of their rights in a summary way. This court has steadily set its face against this view.

“The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary.

“The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions.”

*Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403.

We respectfully urge that the desire of the appellee for hasty and summary adjudication of the fundamental rights of strangers to the bankruptcy proceeding should gain no legal sanction or support by the affirmance of the case at bar for “the right to a choice of the forum in which one desires to litigate is a valuable right and may not be arbitrarily denied”.

*Lewis v. Schrader*, 287 Fed. 893.

The order of the District Court affirming the order of the referee which held that the rights of appellant were subject to a determination in a summary proceeding instituted on petition and order to show cause by the receiver, appellee herein, should be reversed.

Dated, San Francisco,  
Septembre 25, 1940.

Respectfully submitted,

TORREGANO & STARK,

By CHARLES M. STARK,

*Attorneys for Appellant.*



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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THE ORDER OF UNITED COMMERCIAL  
TRAVELERS OF AMERICA,  
Appellant,

vs.

ESTELLE CAMPBELL,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United  
States for the Western District of Washington,  
Northern Division

FILED  
JUL 18 1940

PAUL P. O'BRIEN,  
CLERK



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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THE ORDER OF UNITED COMMERCIAL  
TRAVELERS OF AMERICA,

Appellant,

VS.

ESTELLE CAMPBELL,

Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United  
States for the Western District of Washington,  
Northern Division





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF COUNSEL

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,  
914 Insurance Building,  
Seattle, Washington,  
Attorneys for Appellant.

JONES & BRONSON and  
WHEELER GREY,  
610 Colman Building,  
Seattle, Washington,  
Attorneys for Appellee. [1\*]

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In the Superior Court of the State of Washington  
for King County  
No. 309875

ESTELLE CAMPBELL,  
  
Plaintiff,  
  
vs.

THE ORDER OF UNITED COMMERCIAL  
TRAVELERS OF AMERICA, a corporation,  
Defendant.

## COMPLAINT

Comes now the plaintiff, Estelle Campbell, and respectfully complains and shows the Court as follows:

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

## I.

That plaintiff is a citizen of the State of Washington residing in the City of Seattle, King County. That defendant is a corporation incorporated under the laws of the State of Ohio, and that during all times herein mentioned has been authorized to engage in and has been engaged in the business of writing and issuing contracts of accident insurance. That during all times herein mentioned, defendant has been authorized to do and has been doing business in the State of Washington, and at present is doing business in said State.

## II.

That on the 3rd day of January, 1920, the defendant issued and delivered to Robert Henry Campbell, in the State of Washington, its Class A insurance certificate, No. 155949. That by amendment thereto, dated May 7, 1938, this plaintiff was named beneficiary therein. That all premiums, assessments and other sums due on the said certificate of insurance were paid or tendered and said certificate was in full force and effect at the date of death of said Robert Henry Campbell. That copies [2] of said certificate and amendment are in the possession of defendant herein and are made a part hereof by reference, as fully as though set forth at length herein.

## III.

That among other provisions of said certificate of insurance, the defendant therein covenanted and



agreed to pay to said beneficiary the sum of sixty-three hundred dollars (\$6,300.00) upon due notice of the death of said Robert Henry Campbell; that such death resulted from bodily injury and that such bodily injury was effected solely through external, violent and accidental means.

IV.

That on the 12th day of July, 1938, the said Robert Henry Campbell came to his death from bodily injury effected solely through external, violent and accidental means, within the meaning and terms of said certificate of insurance, as a result of accidentally falling from a height into a stream where he was drowned.

V.

That plaintiff immediately furnished notice of said accidental death to the defendant but was unable to furnish full proof thereof, because on August 2, 1938 said defendant denied any and all liability under the said certificate of insurance and failed and neglected to forward to the plaintiff the forms and blanks necessary for making full proof of said accidental death.

VI.

That defendant owes to plaintiff the sum of sixty three hundred dollars (\$6,300.00) together with interest thereon from August 2, 1938. [3]

Wherefore, plaintiff demands judgment against defendant for the sum of sixty three hundred dol-

lars (\$6,300.00), together with interest thereon from August 2, 1938, until paid, and its costs and disbursements herein to be taxed.

WRIGHT, JONES & BRONSON,  
Attorneys for Plaintiff.

State of Washington,  
County of King—ss.

Estelle Campbell, being first duly sworn, on oath deposes and says: That she is the Plaintiff in the above and foregoing action; that she has read the above Complaint, knows the contents thereof, and believes the same to be true.

MRS. ESTELLE CAMPBELL.

Subscribed and sworn to before me this 15th day of October, 1938.

A. P. BOWES,  
Notary Public in and for the State of Washington,  
residing at Seattle.

Filed in County Clerk's Office, King County, Washington, Oct. 19, 1938. Carroll Carter, Clerk. By B. H. Maffett, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Dec. 8, 1938. Elmer Dover, Clerk. By Elmo Bell, Deputy. [4]

[Title of Court and Cause.]

PETITION FOR REMOVAL

To the Superior Court of King County, Washington, and to the Honorable Judge of said Court:

The Petition of The Order of United Commercial Travelers of America, defendant herein, respectfully shows to the Court:

That the above entitled suit is brought by the plaintiff to recover of said defendant, the sum of Six Thousand Three Hundred Dollars, (\$6,300.), and is wholly of a civil nature, and that the amount and matter in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of Three Thousand (\$3,000) Dollars, all of which will more fully appear by the Petition in said suit, which is hereby referred to and made a part thereof;

That the defendant, The Order of United Commercial Travelers of America, is a foreign corporation, and was at the time of the commencement of said suit, and still is, a non-resident of the State of Washington, and was then, and still is, a fraternal beneficiary association, a corporation duly formed, created and organized under and by virtue of the laws of the State of Ohio; and was then, and still is, a citizen and resident of the State of Ohio, and that Estelle Campbell, the plaintiff herein, was at the time of the commencement of said [5] suit, and still is, a citizen and resident of the State of Washington;



That the time within which said defendant is required by the laws of the State of Washington and the practice of this Court of Washington to answer or plead in said suit has not yet expired, and the defendant files herewith a bond in the sum of Five Hundred Dollars (\$500), with good and sufficient security for its entering in the United States District Court for the Western District, Northern Division of the State of Washington within thirty days (30) from the date of filing this Petition, a copy of the record in the suit, and for paying all costs that may be awarded by said United States District Court if it shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner further avers that at or before the commencement of this suit, there was, and now is, a diversity of citizenship between the parties to said cause; that is, the plaintiff and defendant in this, that is, the plaintiff, Estelle Campbell, at or before the commencement of this suit was, and still is, a resident and citizen of the State of Washington, and the defendant, The Order of United Commercial Travelers of America, was, and still is, by virtue of its said incorporation, a citizen and inhabitant of the State of Ohio.

Wherefore, said defendant prays this Court to proceed no further herein, except to accept this Petition and said bond, and make an order requiring said defendant to enter and file a copy of the record herein in the United States District Court

for the Western District, Northern Division of the State of Washington, as provided by law.

[Seal]           THE ORDER OF UNITED COM-  
                  MERCIAL TRAVELERS OF  
                  AMERICA,

A. W. FRANKLIN,

Supreme Secretary.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,

Attorneys for Petitioner. [6]

State of Ohio,

County of Franklin—ss.

A. W. Franklin, being duly sworn, deposes and says that he is twenty-one (21) years of age and upwards, and is the Supreme Secretary of the defendant herein; that he has read or heard read the foregoing Petition and the contents thereof are true, except to those matters alleged upon information and belief, and as to those matters he believes them to be true.

A. W. FRANKLIN.

Sworn to and subscribed before me this 28th day of October, 1938.

LLOYD WEEKS,

Notary Public, Franklin Co., O. My Commission expires Aug. 24, 1940.

Copy recv'd Nov. 9, 1938. Jones & Bronson, Atty. for plttf. R.V.H. Filed in County Clerk's Office,

King County, Washington, Nov. 9, 1938. Carroll Carter, Clerk. By Ralph C. Parkhurst, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Dec. 8, 1938. Elmer Dover, Clerk. By Elmo Bell, Deputy. [7]

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[Title of Court and Cause.]

ORDER FOR REMOVAL OF THIS SUIT FROM  
THIS COURT TO THE UNITED STATES  
DISTRICT COURT FOR THE WESTERN  
DISTRICT, NORTHERN DIVISION OF  
THE STATE OF WASHINGTON.

The defendant herein, having within the time provided by law, filed its Petition for removal of this cause to the United States District Court for the Western District, Northern Division of the State of Washington, and having at the same time offered its Bond in the sum of Five Hundred (\$500) Dollars, with the National Surety Corporation, good and sufficient surety, pursuant to statute and conditioned according to law;

Now, therefore, this Court does hereby accept and approve said Petition and does hereby order that this cause be removed for trial to the United States District Court for the Western District, Northern Division of the State of Washington; pursuant to the statute of the United States, and that all other proceedings of this Court be stayed.



Done in open court this 15th day of November, 1938.

JAMES B. KINNE,  
Judge.

O. K. as to form:

~~WRIGHT, JONES & BRONSON~~  
Attorney for Plaintiff.

Presented by:

WILLARD E. SKEEL,  
Attorney for Defendant.

Copy rec'd Nov. 9, 1938. Jones & Bronson, Attorney for Pltff. R.V.H. Filed in County Clerk's Office, King County, Washington, Nov. 9, 1938. Carroll Carter, Clerk. By B. H. Maffett, Deputy.

Filed in County Clerk's Office, King County, Washington, Nov. 15, 1938. Carroll Carter, Clerk. By Ralph C. Parkhurst, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Dec. 8, 1938. Elmer Dover, Clerk. By Elmo Bell, Deputy. [8]

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[Title of Court and Cause.]

BOND

Know all men by these presents that we, The Order of United Commercial Travelers of America, a corporation of the State of Ohio, having its principal office in the City of Columbus, as Principal, and the National Surety Corporation, as Surety,

are holden, and stand firmly bound unto Estelle Campbell, in the penal sum of Five Hundred Dollars (\$500), for the payment whereof, well and truly to be made unto Estelle Campbell, her heirs, representatives and assigns, we bind ourselves, representatives and assigns jointly and firmly by these presents.

Upon condition, nevertheless, that whereas, the said The Order of United Commercial Travelers of America has filed its Petition in the Superior Court of King County, State of Washington, for the removal of a certain cause therein pending, wherein Estelle Campbell is plaintiff and the said The Order of United Commercial Travelers of America is defendant, to the United States District Court for the Western District, Northern Division of the State of Washington.

Now, if the said The Order of United Commercial Travelers of America shall enter in said United States District Court for the Western District, Northern Division of the State of Washington, within thirty (30) days from the date of filing said Petition for removal, a certified copy of the record in said suit [9] and shall well and truly pay all costs that may be awarded by the said United States District Court if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise, it shall remain in full force and effect.

In Witness whereof, The Order of United Commercial Travelers of America has hereunto set its

hand and seal this 28th day of October, 1938, and the National Surety Corporation has hereunto set its hand and seal this 9th day of November, 1938.

[Seal] THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,

By A. W. FRANKLIN,

Supreme Secretary.

[Seal] THE NATIONAL SURETY CORPORATION,

By J. H. LOBDELL,

Atty. in Fact. [10]

State of Ohio,  
County of Franklin—ss.

A. W. Franklin, being duly sworn, deposes and says that he is the Supreme Secretary of the said The Order of United Commercial Travelers of America, the corporation which executed the foregoing instrument and acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that he did sign and seal said instrument on behalf of said corporation; and as and for its corporate deed and by authority of its Board of Directors, and that the same is his free act and deed as such Secretary, and is the free act and deed of said corporation for the uses and purposes in said instrument set forth.

In testimony whereof, I have hereunto set my hand and affixed the official seal at Columbus, Ohio, this 28th day of October, 1938.

A. W. FRANKLIN.



Sworn to and subscribed before me this 28th day of October, 1938.

[Seal] LLOYD WEEKS,  
Notary Public, Franklin Co., O. My Commission  
expires Aug. 24, 1940.

Copy recv'd Nov. 9, 1938. Jones & Bronson,  
Atty. for pltff. R.V.H. Filed in County Clerk's  
Office, King County, Washington, Nov. 9, 1938.  
Carroll Carter, Clerk. By Ralph C. Parkhurst,  
Deputy.

[Endorsed]: Filed in the United States District  
Court, Western District of Washington, Northern  
Division, Dec. 8, 1938. Elmer Dover, Clerk. By  
Elmo Bell, Deputy. [11]

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In the United States District Court for the Western  
District of Washington, Northern Division.

No. 20

ESTELLE CAMPBELL,

Plaintiff,

vs.

THE ORDER OF UNITED COMMERCIAL  
TRAVELERS OF AMERICA, a corporation,  
Defendant.

### AMENDED ANSWER

Comes now the defendant and for its amended  
answer admits, denies and alleges as follows:

I.

Answering paragraph 1. of the plaintiff's complaint the defendant admits the same.

II.

Answering paragraph 2. of the plaintiff's complaint the defendant admits that it issued and delivered to Robert Henry Campbell an insurance certificate dated January 3, 1920, being certificate number 155949, and denies each and every other allegation therein contained.

III.

Answering paragraph 3. of the plaintiff's complaint the defendant denies each and every allegation therein contained.

IV.

Answering paragraph 4. of the plaintiff's complaint the defendant denies each and every allegation therein contained.

V.

Answering paragraph 5. of the plaintiff's complaint the defendant admits that it denied any liability under said contract of insurance and except for that portion of said paragraph [12] specifically admitted, denies each and every other allegation therein contained.

VI.

This defendant in answer to paragraph 6. of the plaintiff's complaint denies that it is indebted to

the plaintiff in the sum of \$6300. or any sum whatsoever.

By way of further answer and for its first affirmative defense the defendant alleges as follows:

### I.

That as a part of said certificate or contract of insurance therein it is provided that:

“This Certificate, the Constitution, By-Laws and Articles of Incorporation of said Order, together with the application for insurance signed by said Insured Member, shall constitute the contract between said Order and said Insured Member and shall govern the payment of benefits, and any changes, additions or amendments to said Constitution, By-Laws or Articles of Incorporation, hereafter duly made, shall bind said Order and said Insured Member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects.”

### II.

That the contract and By-Laws as effective September 1, 1937, and of full force and effect at the time of the alleged accidental death of the deceased, Robert H. Campbell, provided in Article IV., Section 1, page 30, line 19 to 29 inclusive, that:

“An annual assessment in the amount of \$16. shall be charged against all insured members on December 2nd of each year. Special assessments not exceeding \$4. may be levied by the



Supreme Executive Committee as often as the needs of the Order require. The annual assessment may be paid annually, semi-annually or quarterly, but in any event, payments of not less than Four (\$4.00) Dollars are due and must be paid on or before December 31, March 31, June 30 and September 30 of each year.”

That said Constitution and By-Laws further provided in Article [13] II, Section 8, page 11, line 40:

“Any member who fails to pay fees, fines, costs, dues or any assessment charged or levied against him, when and as same become due and payable, shall immediately upon such default and by virtue thereof become a delinquent member, and he, his beneficiaries or anyone claiming under his Membership or Certificate of Insurance shall, at the time of such default and by virtue thereof, forfeit all right to indemnity or benefits of every character. While he thus continues a delinquent member the sending to him of notice of any assessment or the making of demand on him for any fees, fines, costs, dues or assessments shall not constitute or be a waiver of such forfeiture.

“Should any delinquent member, at any time, regain his good standing in the Order, his restoration thereto shall in nowise operate to entitle him or anyone claiming by, through or under him or his Certificate of Membership or

Insurance to indemnity or benefits on account of any accident or injury received by him while not in good standing, or on account of death resulting therefrom.”

### III.

That said contract or certificate of insurance herein referred to also provided that:

“If any insured member fails to pay any or all of the fees, fines, costs, dues or assessments charged or levied against him as a member or as an Insured Member of this Order when and as the same becomes severally due and payable, he shall immediately on the happening of such default and by virtue thereof become delinquent and cease to be in good standing as an Insured Member, and he and every person claiming by, through or under him or his membership or his Certificate of Insurance at the time such default occurs and by virtue thereof shall be suspended from any and all rights to indemnity or benefits of whatever character under or through this Article. Should such delinquent member at any time regain his good standing as an Insured Member in the Order, his restoration thereto shall in no wise operate to entitle him or anyone claiming by, through or under him or his membership or his Certificate of Insurance, to indemnity or benefits on account of any accident or injury received by him while not in good standing or on account of death resulting therefrom.

“The sending of notices of any assessments, fees, fines, costs or dues, or making demand for the same, shall not constitute or be held a waiver of such suspension, nor shall the fact that his Certificate of Insurance or of Membership has not been duly cancelled be considered a waiver of such default.” [14]

#### IV.

That on June 30, 1938 assessment number 233 was due and payable. That neither on that date nor any date subsequent thereto was said assessment ever paid and that by reason of said default in the failure to pay assessment number 233 said certificate of insurance was null and void and of no effect whatever at the time of the death of Robert Henry Campbell.

For a further answer and by way of a second affirmative defense the defendant alleges:

#### I.

That said defendant herewith adopts by reference as fully as if set out herein the allegations contained in paragraph I. of its first affirmative defense of this answer.

#### II.

That the Constitution and By-Laws effective September 1, 1937, and which were in full force and effect at the time of the alleged accidental death of the deceased, Robert H. Campbell, provided in Article IV., Section 4, page 33, for the



payment of the sum of \$5,000. in event of an accidental death.

Wherefore having fully answered plaintiff's complaint the defendant prays:

1. For a judgment of dismissal upon the general issue and upon the first affirmative defense alleged, and

2. Should the foregoing prayer for any reason be denied, then in any event that the plaintiff be limited to recovery of \$5,000. against said defendant, and

3. That the defendant recover its costs of suit.

W. R. McKELVY,

Of Attorneys for Defendant. [15]

State of Washington,  
County of King—ss.

W. R. McKelvy, being first duly sworn, on oath, deposes and says:

That he is one of the attorneys for the defendant in the foregoing cause of action; that he has read the foregoing amended answer, knows the contents thereof, and believes the same to be true.

W. R. McKELVY.

Subscribed and sworn to before me this 28th day of January, 1939.

MARTHA C. ANDERSON,

Notary Public in and for the State of Washington,  
residing at Seattle.

Copy Rec'd Feb. 1, 1939. Jones & Bronson, Attorney for.....J.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 2, 1939. Elmer Dover, Clerk. By Elmo Bell, Deputy. [16]

---

[Title of District Court and Cause.]

AMENDED REPLY

Comes now plaintiff and for her amended reply to the amended answer of defendant herein admits, denies and alleges as follows:

I.

Replying to Paragraph I of defendant's first affirmative defense of its amended answer, plaintiff admits the same.

II.

Replying to Paragraphs II and III of defendant's first affirmative defense, plaintiff denies that the provisions of the contract, constitution and by-laws of the defendant therein set forth were in full force and effect at the time of the accidental death of the deceased, Robert H. Campbell.

III.

Replying to Paragraph IV of defendant's first affirmative defense, plaintiff denies each and every allegation therein set forth.

IV.

Replying to Paragraph I of defendant's second affirmative defense in its amended answer, plaintiff admits the same.

## V.

Replying to Paragraph II of defendant's second [17] affirmative defense in its amended answer, plaintiff denies each and every allegation therein contained.

## First Affirmative Reply

By way of its first affirmative reply to the first affirmative defense in defendant's amended answer, plaintiff alleges as follows:

## I.

That Assessment Number 233, dated June 30, 1938, was paid by the decedent, Robert H. Campbell, prior to his death, by virtue of a credit in his favor appearing on the books of defendant.

## Second Affirmative Reply

By way of its second affirmative reply to the first affirmative defense in defendant's amended answer, plaintiff alleges as follows:

## I.

That, in the event the court should find that Assessment Number 233 was unpaid at decedent's death, defendant is estopped to rely upon the said nonpayment by reason of the fact that it and its agents have for years past collected assessments and received payment thereof from decedent, Robert H. Campbell, after the same were said to be due and payable, and, in some cases, more than thirty days after said date, without objection and without penalizing said decedent, whereby decedent



was lulled into belief that said payments fully protected him under the policy.

Third Affirmative Reply

By way of its third affirmative reply to the first affirmative defense in defendant's amended answer, plaintiff alleges as follows: [18]

I.

That by reason of defendant's course of conduct heretofore set out at length in the Second Affirmative Reply, defendant has waived the provisions of its constitutions and by-laws which are quoted in Paragraph II of the first affirmative defense in its amended answer.

Wherefore, having fully replied to the first and second affirmative defenses of the amended answer filed herein by the defendant, plaintiff prays for judgment against the defendant in the sum of Six Thousand Three Hundred (\$6,300.00) Dollars, together with interest and costs of suit.

WHEELER GREY,  
Of Attorneys for Plaintiff.

We consent to the filing of the foregoing amended reply.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Sept. 22, 1939. Elmer Dover, Clerk. By R. B. Allen, Deputy. [19]

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL.

To the Clerk of the Above Entitled Court: and  
To Messrs. Skeel, McKelvy, Henke, Evenson & Uhlmann, Attorneys for Defendant:

Notice is hereby given that the plaintiff in the above entitled cause, Estelle Campbell, elects to have this cause tried by jury and herewith makes demand for the same.

WHEELER GREY,

Of Attorneys for Plaintiff.

Received Feb. 8, 1939. Skeel, McKelvy, Henke, Evenson and Uhlmann, Insurance Bldg., Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 9, 1939. Elmer Dover, Deputy Clerk.

[20]

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[Title of District Court and Cause.]

REQUEST FOR ADMISSION  
UNDER RULE 36

Plaintiff, Estelle Campbell, requests defendant, The Order of United Commercial Travelers of America, a corporation, to make the following admissions for the purpose of this action only, and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That the following described documents, the originals of which are in the possession of the defendant, are genuine:

(a) Book of Account Sheet headed “Campbell, Robt. H., Certificate No. 155949”, at the top of which appears the seal of the Supreme Council of Defendant; the same setting forth in detail the items charged and credited to “Dues Account” and “Assessment Account” from January 1, 1920, to December, 1937, assessment number 231.

(b) Book of Account Sheet similar to that described in (a), showing dues and accounts entries on April 26, 1938 and the statements “Drowned 7/12—” and “Deceased—Date 7/12 Cause Drowning While Fishing.”

2. That each of the following statements is true:

(a) Estelle Campbell, wife of the late Robert H. [21] Campbell, insured under Certificate No. 155,949, is the duly accredited beneficiary under said certificate, as appears by a rider dated May 7, 1938, and attached thereto.

(b) Robert Henry Campbell, insured under Certificate No. 155,949, came to his death from bodily injury effected solely through external, violent and accidental means, viz., by drowning, within the meaning and terms of said certificate.

(c) On August 2, 1938, after plaintiff had notified it of Robert Henry Campbell's death



by drowning on July 12, 1938, defendant denied liability under Certificate No. 155,949 and failed and neglected to furnish and has never furnished to plaintiff blanks for proof of said accidental death as required under its constitution and by-laws.

JONES & BRONSON

WHEELER GREY,

Attorneys for Plaintiff,  
610 Colman Building,  
Seattle, Washington.

Received Jan. 12, 1940. Skeel, McKelvy, Henke, Evenson and Uhlmann. Insurance Bldg., Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jan. 12, 1940. Millard P. Thomas, Clerk. By R. B. Allen, Deputy. [22]

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[Title of District Court and Cause.]

### STIPULATION ON TRIAL

It is stipulated by and between Estelle Campbell, plaintiff in the above-entitled cause, and The Order of United Commercial Travelers of America, a corporation, defendant, acting through their respective attorneys, that, for the purposes of the trial of the said cause, and for no other purpose, the following facts are true, i. e.:

The above-entitled court has jurisdiction of the parties and the cause. Defendant was and is a fraternal beneficiary association.

On January 3, 1920, defendant issued and delivered to Robert Henry Campbell, in the State of Washington, a Class A insurance certificate, No. 155949, being the one upon which this action is based. By amendment thereto, it was provided that \$5,000, rather than \$6,300, was the benefit payable to the beneficiary upon due proof of the death of Robert Henry Campbell resulting from bodily injury effected solely through external, violent and accidental means. By amendment thereto, dated May 7, 1938, plaintiff was named beneficiary.

On July 12, 1938, Robert Henry Campbell came to his death from bodily injury effected solely through external, violent and accidental means, within the meaning and terms of [23] Certificate No. 155949. Defendant was duly notified thereof, and, on August 2, 1938, denied liability under the certificate. Defendant has not furnished to plaintiff or to anyone on her behalf blanks to be filled out and submitted as proofs of claim under the certificate.

Dated this 16th day of January, 1940.

JONES & BRONSON,  
WHEELER GREY,

Attorneys for Plaintiff.

W. R. McKELVY &  
FREDERICK V. BETTS,

Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jan. 17, 1940. Millard P. Thomas, Clerk. By S. Cook, Deputy. [24]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find for the plaintiff and fix the amount of her recovery in the sum of Five Thousand Dollars (\$5000.).

ANTON J. MARX,

Foreman.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jan. 19, 1940. Millard P. Thomas, Clerk. By R. B. Allen, Deputy. [25]  
Jr. 27, Page 305.

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In the United States District Court for the  
Western District of Washington,  
Northern Division

No. 20

ESTELLE CAMPBELL,

Plaintiff,

vs.

THE ORDER OF UNITED COMMERCIAL  
TRAVELERS OF AMERICA,

Defendant.

JUDGMENT

This matter having come regularly on for trial before the undersigned, sitting as one of the Judges of the above entitled court before a jury, on the 17th day of January, 1940, in his court room in the



Post Office Building, Seattle, King County, Washington, plaintiff being present in person, defendant being represented by the Secretary of its Local Council, and counsel for both parties being in attendance, and a jury having been empaneled, examined and sworn, and witnesses having been called, sworn and examined, counsel having been heard, and the cause having been submitted to a jury, and the said jury having returned into open court its unanimous verdict in favor of the plaintiff, and awarding damages to the plaintiff in the sum of \$5,000., the admitted face value of the certificate of insurance which formed the basis of suit, and the court being fully advised in the premises, now, therefore, it is hereby

Ordered, adjudged and decreed that judgment on the said verdict be hereby entered in favor of the plaintiff, Estelle Campbell, in the sum of Five Thousand Dollars (\$5,000.), with interest thereon at 6% from the 2nd day of November, 1938, being in the further sum of \$364.10; and it is further [26]

Ordered, adjudged and decreed that plaintiff be given judgment against defendant for her costs and disbursements herein to be taxed.

Done in open court this 26th day of January, 1940.

CHARLES C. CAVANAH,  
United States District Judge.

Presented by:

WHEELER GREY,  
One of attorneys for Plaintiff

Copy received January 24, 1940.

.....,  
One of the Attorneys for Defendant.

Received Jan. 23, 1940. Skeel, McKelvy, Henke, Evenson & Uhlmann. Insurance Bldg., Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 24, 1940. Millard P. Thomas, Clerk. By R. B. Allen, Deputy. COB No. 3.

[Endorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division. Jan. 29, 1940. Millard P. Thomas, Clerk. By R. B. Allen, Deputy. [27]

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[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Comes now the defendant, The Order of United Commercial Travelers of America, and moves the court herein to render and enter judgment in favor of the defendant herein, dismissing the above entitled action with prejudice, in accordance with this defendant's motion for a directed verdict, made at the time of the trial, notwithstanding the verdict of the jury herein.

Dated this 22nd day of January, 1940.

W. R. McKELVY and  
F. V. BETTS,

Attorneys for Defendant.

Copy received January 23, 1940. Wheeler Grey, one of Attys. for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jan. 23, 1940. Millard P. Thomas, Clerk. By R. B. Allen, Deputy. [28]

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[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

Comes now the defendant The Order of United Commercial Travelers of America, and without waiving its challenge to the legal sufficiency of the evidence; without waiving its motion for a directed verdict made during the trial of the above entitled cause, and without waiving its motion for judgment notwithstanding the verdict but expressly relying thereon, this defendant herein does hereby move that it be granted a new trial in the above entitled cause for the following reasons materially affecting the substantial rights of this defendant:

1. Irregularity in the proceedings of the court and adverse party by which this defendant was prevented from having a fair trial;
2. Substantial errors and rulings on evidence at the trial;
3. Substantial errors in giving the court's instructions;



4. Substantial errors of the court in refusing to give certain of the defendant's requested instructions to the jury;

5. That the verdict of the jury was and is contrary to law;

6. That said verdict is contrary to the evidence in the case; [29]

7. Misconduct of counsel, court and jury;

8. That the verdict appears to have been given under the influence of passion or prejudice;

9. Newly discovered evidence, surprise and newly discovered law;

10. Accident or surprise which ordinary prudence could not have guarded against;

11. Insufficiency of the evidence to justify the verdict, or that it is against the law;

12. Error in law occurring at the trial and excepted to at the time by the party making this application;

Dated, this 22nd day of January, 1940.

W. R. McKELVY and

F. V. BETTS,

Attorneys for Defendant.

Copy received January 23, 1940. Wheeler Grey, one of Attys. for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jan. 23, 1940. Millard P. Thomas, Clerk. By R. B. Allen, Deputy. [30]

[Title of District Court and Cause.]

ORDER

The motion of the defendant for Judgment notwithstanding the verdict and the motion of the defendant for a new trial in the above entitled case having been submitted upon briefs in compliance with stipulation of counsel and after consideration of the same it is

Ordered:

1. That the motion of the defendant for Judgment notwithstanding the verdict is denied.

2. That the motion of the defendant for new trial is denied.

Exception allowed the defendant.

Dated March 18, 1940.

CHARLES CAVANAH,  
District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Mar. 20, 1940. Millard P. Thomas, Clerk. By R. B. Allen, Deputy. COB No. 3, Page 106. [31]

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT  
OF APPEALS

Notice is hereby given that The Order of United Commercial Travelers of America, defendant above named, hereby appeals to the Circuit Court of Ap-

peals for the Ninth Circuit from the judgment entered on the verdict by the Clerk of the above entitled court on January 19, 1940, from the judgment signed January 26, 1940, by one of the judges of the above entitled court and filed in the clerk's office on January 29, 1940, and from the order entered March 20, 1940, denying the defendant's motion for new trial and denying the defendant's motion for judgment notwithstanding the verdict of the jury, all entered in this action.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,  
By FREDERICK V. BETTS,  
Attorneys for Appellant, The  
Order of United Commercial  
Travelers of America.  
914 Insurance Building,  
Seattle, Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Apr. 16, 1940. Millard P. Thomas, Clerk. By S. Cook, Deputy. [32]

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[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND ON  
APPEAL

Know all men by these presents that we, The Order of United Commercial Travelers of America, prin-



cipal, and National Surety Corporation, as surety, acknowledge ourselves to be jointly indebted to Estelle Campbell, appellee in the above cause, in the sum of Five Thousand Three Hundred Sixty-four and 10/100 Dollars (\$5364.10), conditioned that,

Whereas on the 29th day of January, 1940, in the District Court of the United States for the Western District of Washington, Northern Division, in a suit depending in that court wherein Estelle Campbell was plaintiff and The Order of United Commercial Travelers of America was defendant, numbered on the Civil Docket as No. 20, a formal judgment signed by one of the judges of the above entitled court was filed against the said defendant and the said defendant having filed in the office of the clerk of the said District Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of Seattle in the State of Washington on the 9th day of September, 1940, next;

Now, the condition of the above obligation is such that if the said Order of United Commercial Travelers of America shall prosecute its appeal to effect and satisfy the said judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and satisfy in full such modification of the judgment and such costs, interest and dam- [33] ages as the appellate court may adjudge

and award, then the above obligation is void, else to remain in full force and effect.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

By SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,  
By W. R. McKELVY

Its Attorneys

Principal

[Seal] NATIONAL SURETY COMPANY

By J. H. LOBDELL

Attorney in Fact

Surety

Approved this 20th day of April, 1940.

CHARLES C. CAVANAH

Apr. 17, 1940

Judge

Approved as to form and no reason appearing to the contrary as to surety.

JONES & BRONSON

By WHEELER GREY

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Apr. 22, 1940. Millard P. Thomas, Clerk. S. Cook, Deputy. Bound Vol. 4, page 105. [34]

[Title of District Court and Cause.]

ORDER DIRECTING THE FORWARDING OF  
ORIGINAL PAPERS AND EXHIBITS TO  
THE CLERK OF THE CIRCUIT COURT  
OF APPEALS, FOR THE NINTH  
CIRCUIT.

This matter having come on before the undersigned Judge of the above entitled court upon the defendant's motion for an order directing the clerk of said court to forward the original papers and exhibits admitted in the trial of this cause to the clerk of the Circuit Court of Appeals, for the Ninth Circuit upon the appeal of said cause to said court, and the court having considered the defendant's motion and believing it to be proper, Now, Therefore,

It Is Hereby Ordered and Directed, that the clerk of the above entitled court shall forward to the clerk of the Circuit Court of Appeals for the Ninth Circuit, as a part of the record on appeal of the above entitled cause, all the original papers and exhibits which were admitted in the trial of said cause in this court.

Done this 20th day of April, 1940.

CHARLES C. CAVANAH

Judge

O. K. as to form:

~~WHEELER GREY~~

Attorney for plaintiff



Presented by :

W. R. McKELVY &

FREDERICK V. BETTS

Attorney for defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Apr. 22, 1940. Millard P. Thomas, Clerk. By S. Cook, deputy. COB No 3 Page 236 [35]

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[Title of District Court and Cause.]

STIPULATION FOR THE EXTENSION OF  
TIME FOR FILING AND DOCKETING  
RECORD ON APPEAL

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys of record,

Whereas it is impossible to settle, certify, file and docket the record on appeal in the above entitled action within the forty (40) days' time provided in the Rules of the District Court of the United States, rule No. 73G, and pursuant to the provisions of said rule, it is hereby

Agreed that the time within which said record on appeal may be filed and docketed with the Appellate Court may be extended up to and including June 25, 1940.

It is further agreed that the appellant will serve and file its briefs on or before July 31, 1940, and

that the appellee will serve and file her briefs on or before August 30, 1940.

Dated at Seattle, Washington, May 8th, 1940.

JONES & BRONSON &  
WHEELER GREY

Attorneys for Plaintiff

W. R. McKELVY &

FREDERICK V. BETTS

Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division May 13 1940 Millard P. Thomas, Clerk By R. Elias Deputy [36]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING  
AND DOCKETING RECORD ON APPEAL

This matter having come on regularly for hearing before the undersigned Judge of the above entitled Court, pursuant to a written stipulation of the parties hereto, and good cause having been shown therefor, it is hereby

Ordered that the time for filing and docketing the defendant's record on appeal in the above entitled cause be and the same is hereby enlarged and extended to and including June 25, 1940, all pursuant to the provisions of rule No. 73G of the Rules of the District Court of the United States.

Done in open Court, this 10th day of May, 1940.

CHARLES C. CAVANAH

Judge.

Presented By:

FREDERICK V. BETTS

Of Counsel for Defendant

Approved as to Form:

JONES & BRONSON

WHEELER GREY

[Endorsed]: Filed in the United States District Court Western District of Washington, Northern Division May 13 1940 Millard P. Thomas, Clerk By R. Elias Deputy [37]

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[Title of District Court and Cause.]

STIPULATION REGARDING PRINTING  
TRANSCRIPT OF RECORD

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys of record, that there need not be printed in the printed record to be forwarded to the Circuit Court of Appeals the formal caption of the papers in said transcript save to set forth the designation or character of the paper or instrument to be printed and that there may be omitted at the end of such paper, printing or order the formal certificate of filing other than the file marks and date of filing and signature of the clerk.



Dated at Seattle, Washington, this 14 day of May, 1940.

W. R. McKELVY &  
FREDERICK V. BETTS  
Attorneys for Defendant.  
JONES & BRONSON  
WHEELER GREY  
Attorneys for Plaintiff

[Endorsed]: Filed in the United States District Court Western District of Washington Northern Division May 14, 1940 Millard P. Thomas, Clerk By R. Elias Deputy [38]

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[Title of District Court and Cause.]

#### STATEMENT OF POINTS ON APPEAL

Comes now the defendant, The Order of United Commercial Travelers of America, and files this statement of points on which it intends to rely on its appeal from a certain final judgment of this court in the above entitled cause, to-wit:

1. That as a matter of law the court erred in failing to direct a verdict for the defendant at the close of all evidence where the evidence affirmatively shows that the deceased was doing those things which he had a contractual right to do, and where there was no showing that the defendant at any time had waived its rights under the policy upon which this suit is predicated;

2. That as a matter of law the plaintiff failed to prove by the evidence any of the elements of the doctrine of waiver and estoppel and failed to establish a jury question relative to that subject;

3. All of the court's instructions to the jury on the question of estoppel and waiver are erroneous in this case, where the deceased had an affirmative contractual right and was exercising that right and where there was no showing that the defendant did any more or any less than was provided for under the terms of the insurance contract herein.

W. R. McKELVY &

FREDERICK V. BETTS

Attorneys for Defendant.

June 1, 1940

Received Copy

JONES & BRONSON

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division June 12 1940 Millard P. Thomas, Clerk  
By R. Elias Deputy [39]

[Title of District Court and Cause.]

PLAINTIFF'S EXHIBITS

PLAINTIFF'S EXHIBIT "1", adm. Jan. 17,  
1940, Extracts from Insurance Certificate dated  
January 3, 1920, Certificate No. 155949.

"Incorporated Under the General  
Laws of the State of Ohio.

Class A  
Insurance Certificate  
The Order of  
United Commercial Travelers  
of America  
Columbus, Ohio,

An Association incorporated under the laws of the state of Ohio, hereby certifies that Robert Henry Campbell, a member of The Order of United Commercial Travelers of America, in consideration of the statements contained in his application for insurance and the application fee paid by him, is hereby accepted as an Insured Member of said Order under 'Class A,' beginning at twelve (12) o'clock, noon, Standard time, on the day this certificate is dated, and is entitled to all the rights and benefits which may be provided for such 'Class A' Insured Members in and by the Constitution of said Order in force and effect at the time any accident occurs subsequent to said time and date.

This Certificate, the Constitution, By-Laws and Articles of Incorporation of said Order, together



with the application for insurance signed by said Insured Member, shall constitute the contract between said Order and said Insured Member and shall govern the payment of benefits, and any changes, additions or amendments to said Constitution, By-Laws or Articles of Incorporation, hereafter duly made, shall bind said Order and said Insured Member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects.

In Witness Whereof, we have affixed our signatures and [40] the seal of the Supreme Council, at Columbus, Ohio, this 3 day of Jan. A. D. 1920

[Seal]

R. A. TATE

Supreme Counselor.

WALTER D. MURPHY

Supreme Secretary."

(Page 1)

\* \* \* \* \*

### "Delinquency.

If any Insured Member fails to pay any or all of the fees, fines, costs, dues or assessments charged or levied against him as a Member or as an Insured Member of this Order when and as the same becomes severally due and payable, he shall immediately on the happening of such default and by virtue thereof become delinquent and cease to be in good standing as an Insured Member, and he and every person claiming by, through or under him or his membership or his Certificate of Insurance at

the time such default occurs and by virtue thereof shall be suspended from any and all rights to indemnity or benefits of whatever character under or through this Article. Should such delinquent member at any time regain his good standing as an Insured Member in the Order, his restoration thereto shall in no wise operate to entitle him or anyone claiming by, through or under him or his membership or his Certificate of Insurance, to indemnity or benefits on account of any accident or injury received by him while not in good standing or on account of death resulting therefrom.

The sending of notices of any assessments, fees, fines, costs or dues, or making demand for the same, shall not constitute or be held a waiver of such suspension, nor shall the fact that his Certificate of Insurance or of Membership has not been duly cancelled be considered a waiver of such default.”

#### “Cancellations.

If any Insured Member shall be suspended from membership in the Order his Certificate of Insurance shall be deemed cancelled, null and void from and after such suspension without the necessity of any formal record of cancellation.

If any Insured Member shall withdraw from membership in the Order his Certificate or Insurance shall be deemed cancelled, null and void from and after the date of written notice of such with-

drawal without the necessity of any formal record of cancellation.

If any insured Member shall become delinquent and cease to be in good standing as an Insured Member, his Certificate of Insurance may be cancelled by the proper officers of his Subordinate Council.” [41]

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PLAINTIFF’S EXHIBIT “2”, Adm. Jan. 17, 1940, Certificate of Membership dated January 3, 1920.

“Incorporated Under the General  
Laws of the State of Ohio.

The Order of  
United Commercial Travelers  
of America.

Columbus, Ohio,

An Association incorporated under the laws of the State of Ohio, hereby certifies that Robert Henry Campbell is a member of said The Order of United Commercial Travelers of America, being a member of Seattle Council No. 83, at Seattle, Wash. and is entitled to all the fraternal rights and privileges provided by the Constitution, By-Laws and Articles of Incorporation of said Order as they now are or may hereafter be duly changed, added to or amended, He is hereby recommended to the fraternal courtesy of the Brotherhood.



In Witness Whereof, we have affixed our signatures and the seal of the Supreme Council this 3rd day of Jan. 1920, done at Columbus, Ohio.

[Seal]

R. A. TATE

Supreme Counselor.

WALTER D. MURPHY

Supreme Secretary.

Number

155949''

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PLAINTIFF'S EXHIBIT "3", Adm. Jan. 17, 1940, Extracts from the Constitution and By-Laws of the defendant corporation, effective September 1, 1919.

Art. IV, Sec. 7; p. 56:

"Suspensions"

"Sec. 7. Any member who fails to pay the fees, fines, costs, dues or any assessment charged or levied against him, when and as same become due and payable, shall immediately on the happening of such default and by virtue thereof become a delinquent member, and he and every person or persons claiming under him and by virtue of his membership and his certificate of insurance shall likewise, at the time such default occurs and by virtue thereof, forfeit all right to indemnity and benefits of whatsoever character; while he thus continues a delinquent member the sending to him of notice

of any assessment or the making of demand on him for any fees, fines, costs, dues or assessments shall not constitute or be a waiver of such forfeiture.

“Should any delinquent member, at any time, regain his good standing in the Order, his restoration thereto shall in nowise operate to entitle him or anyone claiming by, through or under him or his certificate of membership or insurance to indemnity or benefits on account of any accident or injury received by him while not in good standing, or on account of death resulting therefrom.

“Any member who shall have failed to pay all fees, fines, costs, dues or assessments charged or levied against him when and as the same become due and payable, and who has not restored himself to good standing at or before the time fixed for the next regular meeting of his Subordinate Council after the same shall become due and payable, by paying all such sums due, shall, at such meeting of his Subordinate Council, be suspended from the Order by the Senior Counselor, or, in his absence, by the presiding officer.

“Should any Subordinate Council, however, for any reason, fail at any time to hold its regular meeting, and should there be any member or members thereof at that time who are in default for the payment of any fees, fines, costs, dues or assessment, the Secretary-Treasurer of such Council shall, on the date of such meeting, enter on his

books the suspension of all such members so in default, and such suspension shall become and be operative from and as of such date, and such Secretary-Treasurer shall report to the Supreme Secretary and to his Subordinate Council, at the next regular meeting held by it, the name of the member or members so suspended and the date of such suspension.

“The failure to suspend a delinquent member under the provisions of this section shall not constitute or be a waiver of the forfeiture provided for in this section, and the officer so failing to suspend may be summarily removed from office by the Supreme Counselor.”

Art. IV, Sec. 8, p. 57:

“Reinstatements

“Sec. 8. Any member suspended under the provisions of the foregoing section, desiring reinstatement, shall make application therefor on a blank prepared by the Supreme Executive Committee, to the Council from which he was suspended, and shall accompany such application with a sum equal to the dues for the current period in which he applies for reinstatement, and also one assessment. On the receipt of such application and payment, the Secretary-Treasurer of his Council shall present such request at the next regular meeting of his Council. Each application shall be referred to a



committee of three for investigation, upon whose report a ball ballot shall then be taken upon such application, and if not more than two adverse ballots appear, the Senior Counselor shall declare the applicant reinstated to membership.”

Art. VII, Sec. 2, p. 82, line 13 to p. 83, line 10 and lines 20 to 27:

“Calls and Assessments

Sec. 2. Whenever the Death Fund in the possession of the Supreme Treasurer shall be less than fifteen thousand (\$15,000.00) dollars, or the Disability Fund in the possession of the Supreme Treasurer be less than thirty thousand (\$30,000.00) dollars, or the General Expense Fund in the possession of the Supreme Treasurer be less than twenty-five cents (25¢) for each Insured Member in good standing, the Supreme Counselor shall order a call to be made by the Supreme Secretary upon each Subordinate Council for the Assessment Fund in its possession belonging to the Order to the amount of two (\$2.00) dollars for each Insured Member in good standing in such Subordinate Council, which amount shall be paid to the Supreme Secretary within fifteen (15) days from the date of said call; provided, however, that no newly initiated member shall be included in any call made within the two calendar months succeeding that within which he was insured. [42]

At the time the Supreme Counselor orders a call to be made as hereinbefore provided he shall also order the Supreme Secretary to levy, within fifteen (15) days from the date of said call, an assessment of two (\$2.00) dollars on each Insured Member in good standing in the order as shown on the books of the Supreme Secretary, which assessment shall be paid to the Secretary-Treasurer of the Subordinate Council to which the Insured Member belongs within thirty (30) days from the date the same is levied, and shall be placed to the credit of the Assessment Fund of the Order in the possession of such Subordinate Council. No newly initiated member, however, shall be assessed for any purpose named in this Section within the two calendar months succeeding that within which he was insured.

\* \* \* The mailing of any notice of any assessment to a member of the Order who is not insured or is suspended or is not in good standing, or to anyone whose membership or insurance has been cancelled





or who has been expelled from the Order shall not be held to waive any lapse or forfeiture of rights which may have occurred, from any cause.

Art. VIII, Sec. 3, p. 84, line 14:

“Delinquency.

Sec. 3. If any Insured Member fails to pay any or all of the fees, fines, costs, dues or assessments charged or levied against him as a member or as an Insured Member of this Order when and as the same become severally due and payable, he shall immediately on the happening of such default and by virtue thereof become delinquent and cease to be in good standing as an Insured Member, and he and every person claiming by, through or under him or his membership or his Certificate of Insurance, at the time such default occurs, and by virtue thereof, shall be suspended from any and all rights to indemnity or benefits of whatever character, under or through this Article. Should such delinquent member at any time regain his good standing as an Insured Member in the Order, his restoration thereto shall in no wise operate to entitle him or anyone claiming by, through or under him or his membership or his Certificate of Insurance, to indemnity or benefits on account of any accident or injury received by him while not in good standing or on account of death resulting therefrom.

The sending of notices of any assessment, fees, fines, costs, or dues, or making demand for the

same, shall not constitute or be held a waiver of such suspension, nor shall the fact that his Certificate of Insurance or of Membership has not been duly cancelled be considered a waiver of such default."

"Cancellations.

Sec. 4. If any Insured Member shall be suspended from membership in the Order his Certificate of Insurance shall be deemed cancelled, null and void, from and after such suspension without the necessity of any formal record of cancellation. \* \* \*

If any Insured Member shall become delinquent and cease to be in good standing as an Insured Member, his Certificate of Insurance may be cancelled by the proper officers of his Subordinate Council."

[43]

Art. VII, Sec. 5, p. 85:

"Insurance.

Sec. 5. The Order shall indemnify its Insured Members in accordance with the terms of this Article for disability or death resulting from accidental means under two classes, namely: (A) and (B).

The Supreme Executive Committee shall prepare blanks for application for insurance and Certificates of Insurance for each of said Classes, and may modify, revise and change the same from time to time. Any Certificate of Insurance may have printed thereon, or attached thereto, the provisions of the Constitution relating to insurance, of the Class em-

brased in such certificate and a copy of the Application of the member insured.”

Art. VII, Sec. 8, p. 86:

“Issuance of Certificates.

Sec. 8. Each application for insurance shall be submitted to the Supreme Executive Committee and if said applicant is entitled to an insurance certificate under either of the classes set out in this Article, the Supreme Counselor and the Supreme Secretary shall sign and issue to said applicant a Certificate of Insurance of the form or Class to which he is entitled, and said Certificate of Insurance shall be forwarded to said applicant, by the Supreme Secretary.

Art. VII, Sec. 9, p. 86, line 26 to line 33:

“Insured Members. Class A.

Sec. 9. Any member of this Order who is in good standing and who has not lost either hand, either foot, or the sight of either eye, and is not deaf, subject to fits, or mentally infirm, and who has no wound, injury or disease which will render him especially liable to accident or which would be aggravated or retarded by an accident, may be entitled to insurance under Class A.

Art. VII, Sec. 10, p. 90, line 4 to line 10:

“Insured Members. Class B.

(Physical Disability.)

Sec. 10. Any member of this Order who is in good standing and who may have lost one hand or



one foot, or the sight of one eye, and who is not deaf or subject to fits, nor mentally, or physically infirm, and who has no other impairment which will render him especially liable to an accident may be entitled to insurance under Class B.

Art. VII., Sec. 11, p. 92, line 21:

“Reinsurance.

Sec. 11. Any member whose Certificate of Insurance shall become cancelled, as provided in Section 4 of this Article, desiring insurance shall make application therefor to his Council, on a blank prepared by the Supreme Executive Committee, and shall [44] accompany such application with two (\$2.00) dollars, which shall be placed to his credit in the Assessment Fund.

The application shall be forwarded by the Secretary-Treasurer, within ten days, to the Supreme Secretary.

The Supreme Executive Committee may cause such applicant to be examined by his Council Surgeon or the Supreme Surgeon, or by some competent person selected for that purpose by the Supreme Surgeon. The report of such examination shall be submitted in full to the Supreme Executive Committee, and if such applicant be found to be a desirable risk, and to be in good standing as a member of the Order, the Supreme Executive Committee may insure such member, and shall notify such member and the Secretary-Treasurer of his Subor-

dinate Council of such reinsurance and the Class under which such reinsurance is issued.”

Art. IV, Sec. 22, p. 68, line 4:

“Meetings and Quorum.

Sec. 22. All Subordinate Councils shall hold regular meetings at least once each month, upon a stated date fixed by the Council.” [45]





## PLAINTIFF'S EXHIBITS "4" AND "5"

Admiralty, Jan. 17, 1940—Extracts showing payments, dues and assessments, effective January 1920  
to July 12, 1938

Geo. B. Dunn Box 235 Ra 5604

Name Campbell Robt H.

Certificate No. 155949

## DUES ACCOUNT

## ASSESSMENT ACCOUNT

DUES ACCOUNT						ASSESSMENT ACCOUNT									
		Cr.				Cr.				Cr.				Cr.	
Quarter Beginning	Year	When Paid	Am't	Quarter Beginning	Year	When Paid	Am't	No.	When Called	When Paid	Am't	No.	When Called	When Paid	Am't
Jan'y 1st)	1920	Dec 20	1	Jan'y 1st)	1930	Feb 1	1	154		Dec. 20	2	195	Jan 1	Feb 13	3
April 1st)	"	Apr 5	1	April 1st)	"	"	1	155	Apr 15	Apr. 5	2	196	Apr 1	Apr 13	3
July 1st)	"	May 5	1	July 1st)	"	"	1	156	June 15	May 5	2	197	July 1	July 8	3
Oct. 1st)	"	"	1	Oct. 1st)	"	"	1	157	Aug 15	"	2	198	Oct. 1	Nov. 5	3
Jan'y 1st)	1921	Feb 1	1	Jan'y 1st)	1931	Mar 12	1	158	Oct 15	"	2	199	Jan 1	Feb 1	3
April 1st)	"	"	1	April 1st)	"	6/11	1	159	Dec 15	Aug 26	2	200	Apr 1	"	3
July 1st)	"	"	1	July 1st)	"	"	1	160	Feb 15	Feb 1	2	201	July 1	"	3
Oct. 1st)	"	"	1	Oct. 1st)	"	"	1	161	Apr 15	"	2	202	Oct 1	"	3
Jan'y 1st)	1922	Jan. 14	1	Jan'y 1st)	1932	2/24	1	162	June 15	"	2	203	Jan 1	Mar 12	3
April 1st)	"	"	1	April 1st)	"	"	1	163	Aug 15	"	2	204	Apr 1	6/11	3
July 1st)	"	"	1	July 1st)	"	"	1	164	Oct 15	"	2	205	July 1	"	3
Oct. 1st)	"	"	1	Oct. 1st)	"	"	1	165	Dec 15	Jan 14	2	206	Oct 1	"	3
Jan'y 1st)	1923	Jan 20	1	Jan'y 1st)	1933	2/21	1	166	Feb. 15	"	2	207	Jany 1	2/24	4
April 1st)	"	"	1	April 1st)	"	3/31	1	167	Apr. 15	"	2	208	Apr 1	"	4
July 1st)	"	"	1	July 1st)	"	7/24	1	168	June 15	"	2	209	July	"	4)
Oct. 1st)	"	"	1	Oct. 1st)	"	10/3	1	169	Aug 15	"	2	210	Oct	"	4)
Jan'y 1st)	1924	Feb. 8	1	Jan'y 1st)	1934	3/30	1	170	Oct 15	"	2	211	Jan 1	2/21	4)
April 1st)	"	"	1	April 1st)	"	"	1	171	Jan. 1	Jan 20	3	212	Apr 1	3/31	4)
July 1st)	"	"	1	July 1st)	"	7/27	1	172	Apr. 1	"	3	213	July	7/24	4)
Oct. 1st)	"	"	1	Oct. 1st)	"	11/16	1	173	July 1	"	3	214	Sept	10/3	4)
Jan'y 1st)	1925	Feby 1	1	Jan'y 1st)	1935	11/16	1	174	Oct 1	"	3	215	Dec	12/19	4)
April 1st)	"	"	1	April 1st)	"	3/25	1	175	Jan 1	Feb. 8	3	216	Mar	3/30	4)
July 1st)	"	"	1	July 1st)	"	6/15	1	176	Apr 1	"	3	217	June	7/27	4)
Oct. 1st)	"	"	1	Oct. 1st)	"	10/30	1	177	July 1	"	3	218	Sept	11/16	4)
Jan'y 1st)	1926	Feb 12	1	Jan'y 1st)	1936	10/30	1	178	Oct 1	"	3	219	Dec	11/16	4)
April 1st)	"	May 11	1	April 1st)	"	3-19	1	179	Jan 1	Feby 1	3	220	Mch	3/25	4)
July 1st)	"	"	1	July 1st)	"	7-25	1	180	Apr 1	"	3	221	June	6-15	4)
Oct. 1st)	"	"	1	Oct. 1st)	"	"	1	181	July 1	"	3	222	Sept	10-30	4)
Jan'y 1st)	1928	Jany 10	1	Jan'y 1st)	1937	9-12	1	182	Oct 1	"	3	223	Dec	10-30	4)
April 1st)	"	Apr 10	1	April 1st)	"	3-29	1	183	Jan 1	Feb 12	3	224	Mch	3-19	4)
July 1st)	"	"	1	July 1st)	"	6-30	1	184	Apr 1	May 11	3	225	June	7/25	4)
Oct. 1st)	"	"	1	Oct. 1st)	"	10-13	1	185	May 1	"	3	226	Sept	"	4)
Jan'y 1st)	1929	Feb 13	1	Jan'y 1st)	"	10-13	1	191	Jan 1	Jan 10	3	227	Dec	9/12	4)
April 1st)	"	July 8	1	April 1st)	"	"	"	192	Apr 1	Apr 10	3	228	Mch	3-29	4)
July 1st)	"	Nov 5	1	July 1st)	"	"	"	193	July 1	"	3	229	June	6-30	4)
Oct. 1st)	"	"	1	Oct. 1st)	"	"	"	194	Oct 1	"	3	230	Sept	10-13	4)
												231	Dec	"	4)
1938															
Jan'y 1st)															
April 1st)		4/26	1									232	Mch	4/26	4 00

Drowned 7/12



THE ORDER OF UNITED COMMERCIAL  
TRAVELERS OF AMERICA

Council No. 83

Certificate No.

155949

Name: Campbell, Robt. H.

Date of Issue of Membership Certificate: Jan. 2,  
1920

Insurance Certificate issued Date.....

Class A. Date.....

Class B Date.....

Age. 23

Date of Birth: Apr. 1, 1896

Place of Birth: Pt. Townsend, Wash.

Application received: Dec. 20/19

Residence:

Representing: J. A. Campbell Co.

Address: Seattle, Wn. and Portland, Ore.

Business: Flour

Recommended by J. W. Watson, E. L. Gehman

Investigating Committee: W. D. Doyle, W. T.

Crandall, T. E. Walker

Report of Committee: OK

Date of Election: Dec. 20/19

Date of Initiation: Dec. 20/19

Name of Beneficiary: Mary B. Campbell

Relationship: Mother

Address: Seattle, Wn.

Changed—Date to



Transfer Card Issued—Date 5/11/1926 To Oregon Council No. 84

Transfer Card Accepted—Date 12/17 as Jan. 1, 1928 from Oregon Council No. 83

Miscellaneous

	Date Paid	Am't.
Application fee .....	12/20	5.
Initiation “ .....	“	5.
Total		

Credit as follows:	Am't.
1st Indemnity Deposit*)	
Assessment No. 153 ).....	2.
Dues Account** )	
Quarter Beginning Jan.).....	1.
W. and O. Fund Account.....	3.
	—
General Expense Fund Total.....	4.
	[47]

PLAINTIFF'S EXHIBITS "6" AND "7", Admiralty Jan. 17, 1940, Delinquent Notice and Envelope Mailed July 6, 1938, to Robert H. Campbell.

"The Order of  
United Commercial Travelers  
U. C. T.  
of America  
Box 235  
Seattle, Washington

Seattle  
Jul 6  
11 AM  
1938  
Wash.

Robt H. Campbell  
4107 45th Ave N E

"R. H. C.                Seattle Wash"

Attention  
Final Notice

The Order of  
United Commercial Travelers  
of America

Seattle, July 5 1938

Dear Sir and Bro.

This Notice Is to Advise You That

Assessment No. 233 Expired 6.30. This must be paid at once or you cannot receive any benefits in case of Accident. The Constitution and By-Laws do not permit me to keep members in good stand-

ing after any assessment or dues become delinquent. Kindly remit at once and not become suspended as per Constitution and By-Laws.

Assessment .....	\$4
Dues .....	\$
Total .....	\$1
	5

Fraternally yours,  
 GEO. B. DUNN,  
 Secretary-Treasurer,  
 Seattle, Council, No. 83,  
 P. O. Box 235,  
 Seattle, Wash.

Attend to This at Once

10.00 to Bal of year [48]

[Title of District Court and Cause.]

### DEFENDANT'S EXHIBITS

DEFENDANT'S EXHIBIT "B-1", Adm. Jan. 17,  
 1940. Notice of quarterly installment issued by  
 the defendant's office at Columbus, Ohio  
 (Sample notice)

"Quarterly Installment No. 239  
 of 1940 Annual Assessment

Pays Insurance for January, February and March  
 The Order of United Commercial Travelers  
 of America

Last day for Payment.....December 31, 1939

Remittance must be made to the Secretary of  
 your Council and accompanied by this slip and re-



ceipt card enclosed. Failure to pay installment and Council dues within the above time will invalidate your Insurance. Pay now and be protected.

Date.....

Dear Bro. Secretary:

Enclosed find check for the following—

Quarterly Installment No. 239.....\$4.00

Council Dues ..... 1.00

---

Total .....\$5.00

(If you have already paid, disregard this notice)

In case of accident notify Fred S. Stratmann, Manager of Claim Department, Columbus, Ohio, within 30 days.”

---

DEFENDANT’S EXHIBIT “B-2”, Adm. Jan. 17, 1940, Extract from the January 1940 issue of “The Sample Case”, the national magazine of the defendant

“Installment No. 239

Called Dec. 2, 1939

Expires Dec. 31, 1939

Failure to pay this assessment by above named date as well as all Council dues, forfeits your claim for indemnity. [49]

In Order to File a Valid Claim notice of the accident must be sent to Fred S. Stratmann, Head of Claim Dept.”

DEFENDANT'S EXHIBIT "B-3", Adm. Jan. 17, 1940, Extract from the April 1938 issue of "Seattle Tickler", official publication of the Seattle Council #83, of the defendant

"Secretary's Notes

Boy, Oh Boy! How can you do it? After all the time I have told you about paying the assessments during the month, they are called in order to be able to file a valid claim, Some of Our Boys Are Now Behind and Would Find Themselves Without Benefits or Their Beneficiary Short of the Death Benefits Should Accident and Death Be Their Misfortune. Check up your receipts and if you do not have one for 232, get the five in at once."

---

DEFENDANT'S EXHIBIT "B-4", Adm. Jan. 17, 1940, Extract from the May 1938 issue of "Seattle Tickler", official publication of the Seattle Council #83, of the defendant

"Secretary's Notes

To be protected in case of accident, it is necessary to have a receipt for assessment 232 and your receipt for dues to June. When we have to suspend a Brother for non-payment of an assessment, it is with deep regrets as we know that this Brother may need the protection more than the Council needs the membership; besides, we don't like to lose a member. We have just completed the Golden

Jubilee drive which secured for Seattle Council No. 83, fifty-six new members, two Gold Medals, three Gold Watches and an Honor Council Altar Cloth, besides the satisfaction of doing a big job well. Thanks to everyone for the co-operation in helping the secretary in his work of getting ready the applications on time.

Look Up Your Receipt and If [50] Not Paid, Send Your Check at Once And you will be on the protected list again. You Might Be Next And You May Not Be Able to Stand the Risk.”

---

DEFENDANT'S EXHIBIT “B-5”, Adm. Jan. 17, 1940, Extract from the June 1938 issue of “Seattle Tickler”, official publication of the Seattle Council #83, of the defendant

“Secretary's Comments

Assessment 233 was called the first of the month and Must Be Paid during the month of June in order to keep you fully insured so that you can collect should you have an accident. Think Twice Before You Attempt to Carry Your Own Insurance During Vacation Months. Remember the Fourth of July Is Before the 39th of June Takes Just Outside. Five Dollars Paid and Worry Off Your Mind.”



DEFENDANT'S EXHIBIT "B-6", Adm. Jan. 17, 1940, Extracts from the Constitution and By-Laws of the defendant corporation, effective September 1, 1937.

**"Insured Membership"**

Art II, Sec. 2; page 4, line 10: "Any white male citizen of the United States, Dominion of Canada or British Possessions in North America, of good moral character, and in good physical and mental condition, not under eighteen (18) years and not over fifty-five (55) years of age, who is classified as a preferred risk and is engaged either as a traveling man or in business or professional occupations, may become an insured member of this Order, if found acceptable; provided, however, any applicant not classified as a preferred risk may be accepted as an insured member of this Order, if he is willing to accept a rating based upon the occupational rating fixed by the Conference Manual published by the Health and Accident Underwriters revised to May 1, 1925, on the percentage basis outlined in Article IV, Section 7, herein."

\* \* \* \* \*

Art. II, Sec. 3; page 7, line 18: "All members of the Order shall be considered in good standing only so long as they pay, when and as the same becomes due and payable, all fees, fines, costs dues and assessments charged and levied against them and support the principles of the Order and faithfully observe its Constitution, By-Laws, Rules and Edicts

approved by the Supreme Executive Committee or the Supreme Council, as such Constitution, By-Laws, Rules and Edicts now exist, or as they may hereafter be added to, revised or amended.”

\* \* \* \* \*

[51]

### “Associate Membership”

Art. II, Sec. 4; page 8, line 6: “Any white male citizen not under eighteen (18) years of age, residing in the jurisdiction of the Supreme Council, who is interested in the work of this Order from a fraternal or business promotion standpoint, may make application for Associate Membership as hereinafter provided for in this Section and if found acceptable, shall be entitled to become an Associate Member, but such member or his beneficiary shall not receive any financial benefits.”

\* \* \* \* \*

Art. II, Sec. 4; page 8, line 38: “Such Associate Member shall pay to his Local Council the regular local council dues plus Fifty (50) Cents for annual subscription to The Sample Case.”

\* \* \* \* \*

### “Delinquency”

Art. II, Sec. 8; page 11, line 40: “Any member who fails to pay fees, fines, costs, dues or any assessment charged or levied against him, when and as same become due and payable, shall immediately upon such default and by virtue thereof become a delinquent member, and he, his beneficiaries or any-

one claiming under his Membership or Certificate of Insurance shall, at the time of such default and by virtue thereof, forfeit all right to indemnity or benefits of every character. While he thus continues a delinquent member the sending to him of notice of any assessment or the making of demand on him for any fees, fines, costs, dues or assessments shall not constitute or be a waiver of such forfeiture.

“Should any delinquent member, at any time, regain his good standing in the Order, his restoration thereto shall in nowise operate to entitle him or anyone claiming by, through or under him or his Certificate of Membership or Insurance to indemnity or benefits on account of any accident or injury received by him while not in good standing, or on account of death resulting therefrom.

#### “Suspensions.

“Should any delinquent member fail to restore himself to good standing within thirty (30) days from the date of such delinquency, the Secretary-Treasurer of his Local Council shall immediately suspend him from membership and insurance in the Order. Such Secretary-Treasurer shall at once notify the Supreme Secretary of such suspension and report the same to his Local Council at its next regular meeting.

“Failure to suspend a delinquent member under the provisions of this Section shall not constitute nor be deemed a waiver of the forfeiture provided for in this Section, and the Officer so failing to



suspend may be summarily removed from office by the Supreme Counselor.”

### “Reinstatement”

Art. II, Sec. 9; page 12, line 34: “Any one suspended under provisions of the foregoing Section or who has withdrawn [52] from the Order, and who is not over sixty (60) years of age, desiring reinstatement, may make application therefor on a blank prepared by the Supreme Executive Committee, to the Council from which he was suspended or had withdrawn to any Council within whose jurisdiction he resides and shall accompany such application with a reinstatement fee in a sum equal to the dues for the current period in which he applies for reinstatement and, should application of a suspended or withdrawn member be made to a Council other than the one from which he was suspended or withdrawn, written permission to reinstate must be obtained from the Council from which he was suspended or withdrawn, signed by the Secretary and bearing the seal of the Council, and said written permission, together with the amount of one assessment, must be attached to the application when forwarded to the Supreme Office. On receipt of such application and payment, the Secretary-Treasurer shall present such request at the next regular meeting of his Council. Each application shall be referred to a committee of three for investigation, upon whose report a ball ballot shall then be taken upon such application, and if

not more than two adverse ballots appear, the Senior Counselor shall declare the applicant reinstated to membership, subject to the approval of the Supreme Executive Committee. Provided, however, anyone suspended under the provisions of the foregoing Section, who desires reinstatement within ninety days of the date of his suspension, may be reinstated by signing a statement prepared by the Supreme Executive Committee, that his mental and physical condition is not impaired in any way that would render him undesirable for insurance and the payment of such pro-rata portion of the annual assessment as may be fixed and determined by the Supreme Executive Committee and a sum equal to the dues for the current period. Provided, however, such suspended member who has put in an application for reinstatement within ninety (90) days of the date of his suspension, who is over sixty (60) years of age, may be reinstated upon submission of a satisfactory medical report made at the applicant's own expense by a physician or surgeon selected by the Order. The Secretary-Treasurer shall forward the statement, together with the amount of one assessment to the Supreme Secretary, and if the application is approved by the Supreme Executive Committee, the Supreme Secretary shall make record of the reinstatement and forward a statement to the applicant showing such reinstatement.

“The right of such applicant or his beneficiary to fraternal privileges of the Order or indemnity under the provisions of Article IV, shall not accrue until twelve o’clock noon, Eastern Standard Time, of the day upon which his application is approved by the Supreme Executive Committee.

“At the next meeting of the Council, the Secretary-Treasurer shall report the reinstatement and record it in his minutes.”

“Meetings and Quorum.”

Art. II, Sec. 24; page 23, line 12: “All Local Councils shall hold regular meetings at least once each month, upon a stated date fixed by the Council.”

\* \* \* \* \*

[53]

“Article IV.

“Insurance.”

Article IV, Section 1; page 30, line 19: “An annual assessment in the amount of Sixteen (\$16.00) Dollars shall be charged against all insured members on December 2 of each year. Special assessments not exceeding four (\$4.00) Dollars may be levied by the Supreme Executive Committee as often as the needs of the Order require. The annual assessment may be paid annually, semi-annually or quarterly, but in any event, payments of not less than Four (\$4.00) Dollars are due and must be paid on or before December 31, March 31, June 30 and September 30 of each year.



“No newly initiated member, however, shall be assessed for any purpose named in this Section within two (2) calendar months succeeding that within which his Certificate of Insurance was issued. Thereafter such newly initiated member shall pay his pro-rata portion of said annual assessment in the manner and amount set forth in the preceding paragraph.

“No formal or official notice of said annual assessment or of the date or dates when same, or instalments thereof, become due and payable, shall be made but information relative thereto may, in the discretion of the Supreme Executive Committee be disseminated to the members by publication in the Sample Case, the official magazine of the Order, or by mail; provided, however, that such publications or communications, in whatever form made, shall not be considered as a formal or official notice and failure to receive same shall not constitute or be deemed a waiver of the provisions contained in Article II, Section 8 herein, relative to Delinquency and Suspension.”

\* \* \* \* \*

“Cancellation of Insurance Certificates.”

Art. IV., Sec. 2; page 31, line 15: “If any Insured Member shall be suspended from membership in the Order his Certificate of Insurance shall be deemed cancelled, null and void from and after such suspension without the necessity of any formal record of cancellation. [54]

Art. IV, Sec. 13, p. 47, line 37:

“Waivers”

“No Grand or Local Council, officer, member or agent of any Local, Grand or the Supreme Council of the Order is authorized or permitted to waive any of the provisions of the Constitution of this Order, relating to insurance, as the same are now in force or may be thereafter enacted.”





[Title of District Court and Cause.]

PLAINTIFF'S ABSTRACT OF TESTIMONY

Be it remembered that on the trial in this court of the above-entitled cause at the November term of 1939, the Hon. Charles C. Cavanah presiding;

Plaintiff appearing in person and by her attorneys, Wheeler Grey and Harry B. Jones, Jr. of the firm of Jones & Bronson;

Defendant appearing through its attorneys, W. R. McKelvy and Frederick V. Betts of the firm of Skeel, McKelvy, Hencke, Evenson & Uhlmann, the following proceedings were had commencing on January 17, 1940, to-wit:

A jury was impanelled and sworn according to law to try the cause.

Mr. Grey: "At this time, Your Honor, the plaintiff would like to offer in evidence insurance certificate No. 155949. \* \* \*

The Court: It will be admitted."

(Plaintiff's Exhibit No. 1, Insurance Certificate, admitted in evidence.)

Mr. Grey: "At the same time, and for the purpose of completing the record of what was issued to Mr. Campbell on January 3, 1920, we offer a certificate by the Supreme Council stating that Mr. Campbell has been admitted to membership in the order and is a member in good standing; and, of course, that too is subject [55] to the admission of the present constitution and by-laws by the defendant.

Mr. McKelvy: I have no objection, your Honor.

The Court: Admitted."

(Plaintiff's Exhibit No. 2, certificate of membership, admitted in evidence.) Tr. 3.

Mr. Grey: "We should also like to offer in evidence a printed copy of the constitution and by-laws of the defendant, effective as of September 1, 1919, which have been certified by the Supreme Secretary of that time. \* \* \*

The Court: It will be admitted. Overruled. We will see what develops."

(Plaintiff's Exhibit No. 3, constitution and by-laws of 1919, admitted in evidence.) Tr. 5.

Testimony of

HELEN P. LEGHORN

for Plaintiff

Helen P. Leghorn, produced as a witness for the plaintiff, being first duly sworn, testified on direct examination to the following facts:

I am a tax accountant and previously an assistant deputy commissioner to the Insurance Commissioner. I have custody of the constitution and by-laws filed by fraternal benefit societies. Exhibit No. 3 is the constitution and by-laws of the Order of United Commercial Travelers of America, as filed in the office of the Commissioner of Insurance of the State of Washington. Exhibit No. 3 was filed on March 3, 1920. No other constitution and by-laws

(Testimony of Helen P. Leghorn.)

was filed by the Order between September 1, 1919, and January 3, 1920.

Cross Examination by Mr. McKelvy

The fraternal companies are not required to file all their by-laws but we request them to do so so that we may have them of record. Tr. 7. [56]

Testimony of

GEORGE B. DUNN

for Plaintiff

George B. Dunn, produced as an adverse witness by the plaintiff, being first duly sworn, testified on examination to the following facts: Tr. 10.

I was subpoenaed to bring the book of account sheet which is headed, "Campbell, Robert H., Certificate No. 155949." I was also subpoenaed to bring in all letters, documents and applications in the possession of The Order of United Commercial Travelers of America relating to the suspension and the reinstatement to membership in said order of Robert Henry Campbell, occasioned by or resulting from the non-payment of dues. We have no records of suspension for dues because the suspensions are made in Columbus, Ohio. The only records which I would have showing whether Mr. Campbell was suspended from membership for non-payment



(Testimony of George B. Dunn.)

of dues and reinstatement is my cash book which I have here with me.

(At this time the witness produced and there was admitted in evidence, without objection, Plaintiff's Exhibit No. 4, account sheets, and Plaintiff's Exhibit No. 5, account sheets. Due to the fact that the Court has advanced the trial date, the required period of ten days since the service of a request for admission under Rule 36 has not expired.) Tr. 12. Defendant admits, for the purposes of the record, that Plaintiff's Exhibits Nos. 4 and 5 are genuine.

Plaintiff's Exhibit No. 4 shows that he applied for membership on the 20th of December, 1919. Certificate of membership was issued to him on January 2, 1920. Plaintiff's Exhibit No. 2, the insurance certificate, shows the effective date January 3, 1920, signed in Columbus, Ohio. (Tr. 14) I have been a member of the organization for forty years and have been secretary for thirteen or fourteen years. Plaintiff's Exhibits No. 4 and [57] No. 5, account records, show two separate accounts, dues accounts and assessment accounts. (Tr. 20) These records show that dues payable January 1, 1921 were paid February 1, 1921. That was a period of thirty-one days. He was not late in his payment at that time. If he was suspended from membership, the records would be marked "Suspended". I mark them on my ledger sheets which is the practice of secretaries of the organization, but I do not know what the

(Testimony of George B. Dunn.)

previous secretary did in this regard. The dues payment due on January 1, 1922, were paid January 14th.

Mr. Grey: "Do your records show that Mr. Campbell was suspended from membership?"

Mr. McKelvy: I want to interpose an objection at this time. Apparently it is counsel's theory that because this man was late on other occasions from time to time that there was a waiver of some kind. In view of the provisions of the contract itself, I object to the question and his line of testimony on the ground that it is wholly immaterial and irrelevant and incompetent as to the fact that he may have been late on other occasions." (Tr. 21)

(The jury was excused from the jury box and the court heard argument of counsel after which the defendant's objection was overruled.)

The Court: "The recent decision of the Supreme Court of the United States, as to the highest court of the state in which they were trying it, is binding and final upon the federal courts, and we have to follow those decisions. That is a recent decision. Now, that revolutionizes the principle of law applicable to federal courts. The Supreme Court of this state I see has adhered to that principle, where an insurance company, although it may have a provision in its constitution and by-laws, and even in its certificate of insurance, has accepted thereafter [58] from time to time assessments and dues upon a pol-

icy from the insured, although there may have been a previous delinquency, that it waives the question that the insured is not entitled to enforce that policy. That delinquency, of course, would be deducted from whatever recovery, if any, was had in the case. The company would be entitled to that payment. But I see they hold, in a large number of cases—the Supreme Court of this state has held to that principle, because the insured has been led to believe that from year to year that he was insured.

Now, why did they accept these dues from year to year? Where the party goes on and continues carrying out this contract and accepting dues, and they lead the insured to believe that they are protecting the insured, the Court has held that that is a waiver. The Supreme Court of this state has held to that effect in a lot of cases. To do otherwise would be highly inequitable. It puts the insured where he could go out and get other insurance, but now he relied upon that. If he did, that is the principle. I follow your contention in the matter. The objection will be overruled. I understand that is the principle of law, that you are permitted to offer evidence, to see what the evidence is, and you offer it on that ground, and not upon the question of notice, failure to give notice.”

(The jury returned to the jury box).

The dues which were due on January 1, 1923, were paid January 20th. It was not a late payment.  
(Tr. 24)



(Testimony of George B. Dunn.)

Mr. Dunn: "Back in the days of '20, '21, and '22, they had thirty days after it was called. They had it back in those early years; they had thirty days. Now, the constitution was changed back in there sometime, where they made a change in the date of the call, and they had to be paid at the end of that call and never had thirty days. The calls were later than they are [59] today. I don't know just the date of that call. \* \* \* I can't tell you in which copy of the constitution and by-laws that change appears." (Tr. 24, 25)

Dues are called at the same time assessments are. They are due for a year on the 1st day of January, \$4.00 a year. They can be paid quarterly, payable in advance, the same as assessments are. The various quarters begin on the 1st of January, the 1st of April, July and October. (Tr. 27) The quarterly payment of dues which were due on January 1, 1923 were paid January 20th. The record does not show that Mr. Campbell was suspended from good standing and membership in the organization by reason of that payment twenty days after January 1st. He had thirty days in which to pay them. Quarterly payment due on January 1, 1924 was paid February 8th. The record does not show that Mr. Campbell was suspended from membership by reason of the fact that the payment was made thirty-nine days after January 1st. Quarterly dues payable January 1, 1925 were paid February 1st. The records do not show that Mr. Campbell was suspended because the payment was made thirty-one

(Testimony of George B. Dunn.)

days after January 1st. Those due January 1, 1926 were paid February 12th. The records do not show that Mr. Campbell was suspended by reason of the fact that the payment was made forty-three days after January 1st. Those due April 1, 1926 were paid May 11th, forty-one days after April 1st. The records do not show that Mr. Campbell was suspended by reason of the fact that the payment was made forty-one days after April 1st. Those due January 1, 1928 were paid on January 10th. Those due April 1, 1928 were paid April 10th. Those due January 1, 1929 were paid February 13th. The records do not show that Mr. Campbell was suspended by reason of the fact that the payment was made forty-four days after it was due on January 1st. (Tr. 31) I became secretary of this Order thirteen or fourteen years ago, [60] long about 1928. Quarterly dues payment on April 1st were paid July 8th. The records do not show that Mr. Campbell was suspended by reason of the fact that the payment was made ninety-nine days after it was payable on April 1st. Those due July 1, 1929 were paid November 5th. The records do not show that Mr. Campbell was suspended by reason of the fact that the payment was made one hundred twenty-eight days after it was due. Payment due October 1, 1929 was paid on November 5th. He was not suspended because the payment was made thirty-six days after it was payable. Those due on January 1, 1930 were paid February 1st. The records do not show that Mr.



(Testimony of George B. Dunn.)

Campbell was suspended by reason of the fact that the payment was made thirty-one days after it was due. Our records do not show that Robert Henry Campbell was suspended by reason of the fact of non-payment or late payment of dues and assessments at any time prior to June 30, 1938. (Tr. 33) The dues payable January 1, 1931 were paid March 12th. Those due on January 1, 1932, paid February 24th. Those due January 1, 1933, paid February 21st. Those due on July 1, 1932, paid July 24th. Thoses due on October 1, 1932, paid October 3rd. The January 1, 1934 dues were paid March 30th. Those for July 1, 1934, paid July 27th. Dues for October 1, 1934, paid November 16th. Those due October 1, 1935, paid October 30th. Payment due on July 1, 1936, paid March 19th. They were paid in advance. Those due on October 1, 1937 were paid on July 25th, paid in advance. Those due on July 1st were paid on July 25th, at the same time.

Mr. Grey: "I see. Now, will you turn your attention to the assessment account column and direct your attention to assessment No. 165; when was that called?

A. 165?

Q. Yes. [61]

A. That was called December 15.

Q. And when was it paid?" (Tr. 35)

Assessment No. 165 was paid January 14th. Assessment No. 171 called January 1st, paid January 20th. Assessment 175 was called January 1st, paid



(Testimony of George B. Dunn.)

February 8th. Assessment No. 179 was called January 1st, paid February 1st. No. 183 was called January 1st, paid February 12th. The assessments don't relate particularly to years. They relate to the number of the assessment. (Tr. 37) Assessment No. 165 was in 1922. Assessment No. 171 was called January 1, 1924, and paid January 20th. Assessment 175 was called January 1, 1925, paid February 8th. No. 179 was paid on January 1, 1926. Assessment No. 183 was called January 1, 1926, and paid February 12th. Both the dues and assessments are paid at the same time. Assessment 184 due April 1st, paid May 11th. Assessment No. 191 was due January 1st, paid January 10th. I am not sure of what year. Assessment No. 192 was due April 1st, paid April 10th. 195 due January 1st, paid February 13th. 196 due April 1st, paid April 13th. No. 197 due July 1st, paid July 8th. 198 due October 1st, paid November 5th. 199 due January 1st, paid February 1st. No. 203 was due January 1st and paid March 12th. Assessment 204 due April 1st, paid June 11th. Assessment No. 207 was due January 1st, paid February 24th. No. 211 due January 1st, paid February 21st. No. 213 due July 1st, paid the 24th of July. No. 217 was due July 1st and paid July 27th. Assessment 218 was due October 1st, paid November 16th. Assessment No. 222 was due September 30th and paid October 30th. Assessment 225 was due June 30, 1936, paid July 25, 1936. No. 230 was due September 30, 1937,

(Testimony of George B. Dunn.)

paid October 13th. No. 232 was due in March, 1938, payable any time up to March 30th, actually paid April 26th. [62]

Mr. Grey:

“Q. Now, do your records show when assessment No. 233 was called?

A. It hasn't been entered on his book because it wasn't posted at that time. It was called in June.

Q. Was it paid? A. Never paid.

Q. Your books show that it was not paid?

A. Yes, sir.” (Tr. 44)

Dues and assessments are both called at the same time. Assessment No. 233 was called the 1st of June, payable during the month of June, but it was never paid. The dues were not paid either. The last payment was made on April 26, 1938.

Mr. Grey:

“Q. Now, is your habit to collect all dues from members as of the day they are due?

A. We receive them. We don't have to go out and make any collections whatever.

Q. What happens if they are not paid on the day they are due?

A. Well, our customary custom is to mail them out a delinquent notice as soon as we can get to it after the 1st of the month, past due, notifying them that they have no protection until their insurance is paid. Then if we would meet them on the street, we would tell them. It is just a matter of courtesy.” (Tr. 45)

Testimony of

ARTHUR C. MERRILL

for Plaintiff

Arthur C. Merrill, produced as a witness on behalf of the plaintiff, being first duly sworn, testified on direct examination to the following facts: (Tr. 46)

I was associated in business with Robert Henry Campbell. I received a notice of the fraternal order. I did not see this notice until after Mr. Campbell's death. [63]

Cross Examination by Mr. McKelvy

I saw the notice at the office. Mr. Campbell and I had the same office. It was addressed to his residence. He apparently brought it from his residence to our place of business. (Tr. 47)

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Testimony of

ESTELLE CAMPBELL

for Plaintiff

Estelle Campbell, plaintiff in the action, testified on direct examination to the following facts:

I am the plaintiff in this suit and Robert Henry Campbell was my husband. After his death I returned to our home.

(The jury retired for the noon recess after which the following testimony was taken). (Tr. 49)



(Testimony of Estelle Campbell.)

The accident happened in Oregon on July 12th and we came back to Seattle on the following Thursday, which was the 14th. Before I got home neighbors had gone into the house to make it as pleasant as possible and had taken the mail out of the box. The mail box is inside a coat closet but I didn't see this until the following morning (referring to Plaintiff's Exhibit 6 which is an envelope and 7 which is a notice and which was found inside the envelope.) When the envelope was brought to me it had not been opened. The mail had all evidently been taken out of the box and all placed some place. Nobody thought about the mail, of course, until all this was over. Exhibit No. 7 is a notice to Mr. Campbell that he is owing the defendant \$4.00 and it carries the date July 5th. The date stamped on the envelope, Plaintiff's Exhibit No. 6, is July 6th and it is from the United Commercial Travelers.

(Plaintiff's Exhibits 6 and 7 were admitted in evidence without objection.) (Tr. 51)

Mrs. Campbell continuing: The first time I saw this envelope, it was sealed. I opened it. I went to Oregon on this occasion just after school closed, about June 18th. Mr. Campbell [64] came down on July 2nd.

(Plaintiff's Exhibits 4 and 5 were admitted in evidence without objection.)

(Testimony of Estelle Campbell.)

Cross Examination by Mr. McKelvy

I wouldn't know whether Mr. Campbell received a notice around or about the 1st of June of the fact that the payment would be due on June 30th. (Tr. 55) I think Mr. Campbell received a magazine called "The Sample Case" from the United Commercial Travelers. I don't think I ever did look through it. I don't suppose I ever did see any installment notice as indicated in the magazine.

Whereupon the plaintiff rested. (Tr. 57)

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### Defendant's Testimony

Testimony of

**GEORGE B. DUNN**

for Defendant

George B. Dunn, produced as a witness on behalf of the defendant, having been previously sworn, testified on direct examination to the following facts: (Tr. 57)

The Supreme Council at Columbus, Ohio, sends out a call or a notice thirty days before an assessment is due. I just wait for the payment to come in and if I do not receive it within a few days after the time it is due, I mail out a notice to the member showing that it has not been received by me and that the policy is delinquent in so far as the payment is concerned. Defendant's Exhibit B-1 is a notice similar to those sent out by the Supreme Council thirty days before the due date.

(Testimony of George B. Dunn.)

(Defendant's Exhibit B-1, delinquent notice, admitted in evidence without objection.) (Tr. 61)

Our organization publishes a magazine called "The Sample Case" and in each issue of the magazine which comes out twelve times a year, there appears a notice of the due date for the next [65] assessment. Exhibit B-2 is one of the issues of the magazine. The wording of the notice in that issue of the magazine is almost identical to the one that went out June 1, 1938.

(Defendant's Exhibit B-2, issue of "The Sample Case", admitted in evidence without objection.) (Tr. 63)

I publish a magazine here in our local council. It is published every month. This publication was mailed to Mr. Campbell.

(Defendant's Exhibits B-3, B-4 and B-5, issues of official publication, admitted in evidence without objection.) (Tr. 64)

The 1937 constitution and by-laws were effective in July, 1938, when Mr. Campbell died.

(Defendant's Exhibit B-6, 1937 constitution and by-laws, admitted in evidence without objection.) (Tr. 65)

### Cross Examination by Mr. Grey

I send out what is called a courtesy notice of delinquency to each member after the date upon which the assessment was due. It is not compulsory. Plain-



(Testimony of George B. Dunn.)

tiff's Exhibit No. 7 is the notice I sent out in this case. If the sum was not paid at the end of the thirty day period after it was due, we entered the member in our suspension account. I never entered Mr. Campbell as suspended. He always paid within the time. (Tr. 65)

Redirect Examination by Mr. McKelvy

Mr. McKelvy:

“Q. What was your practice so far as sending in suspensions were concerned, as distinguished from delinquent members?

A. At the end of the thirty-day period, we had to send them in.

Q. Well, send them in as what?

A. On our reports to Columbus.

Q. Well, what do you mean by the thirty-day period? [66]

A. Well, they have thirty days to pay it in.

Q. Thirty days after what?

A. After the call. If they don't pay it within thirty days, then I have to report them suspended. If they pay it during the thirty days, I enter them in as insured members again.

Q. And when does your report go in?

A. As soon after the first as I can complete it. I have to have them in before the fifteenth.”

Defendant's Exhibit B-7 is a photostatic copy of Mr. Campbell's application for insurance.

(Defendant's Exhibit B-7, photostatic copy of application, admitted in evidence.) (Tr. 67)

(Testimony of George B. Dunn.)

Recross Examination by Mr. Grey

Under the 1937 by-laws, quarterly assessments are due and must be paid on or before December 31, March 31, June 30 and December 30 of each year. As an example, on the first day of December the Columbus headquarters sends to each person a notice that on or before December 30th they must pay the \$4.00 assessment due on that day. I receive payments that are made prior to December 30th. If anyone does not pay by December 30th they become delinquent. If he did not pay his assesment by January 30th, then on the next day I marked him and reported him as suspended. I never marked Mr. Campbell as suspended because he never ran over that extra month according to my records

Redirect Examination by Mr. McKelvy

“Q. Just one question here. Did you distinguish between delinquency and suspension?

A. We do, yes, because we don't enter them as suspended until the end of our thirty-day period.

Q. That is what I was getting at. I am not so sure but what you and Mr. Grey were using words at cross purposes, delinquent [67] and suspension. When is a man delinquent?

A. According to the constitution, he is without coverage, without any insurance the first day after

(Testimony of George B. Dunn.)

it is delinquent, according to his payment, his first thirty days.

Q. The first day after the insurance isn't paid, he is delinquent?           A. Surely.

Q. And when does he become suspended?

A. After thirty days. That is when I have to enter him in my list."

The defendant rests. (Tr. 73)

Plaintiff has no rebuttal.

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(Whereupon the jury was excused from the jury box and in their absence the following proceedings occurred.)

Mr. McKelvy: "Comes now the defendant, all parties having rested, and at this time challenges the legal sufficiency of the plaintiff's testimony to make out a case to go to the jury and moves the court to dismiss the action and to instruct the jury to return a verdict in favor of the defendant as a matter of law, on the grounds and for the reason that the plaintiff has failed to sustain the burden of showing that the policy in question or the insurance certificate in question, was in good standing and in full force and effect at the time of the death of the decedent, for the reason that the defendant has affirmatively shown that the policy was not paid up, that it was in default, and that the member was



delinquent at the time of his death. The plaintiff has failed to sustain her allegation that there was a waiver on the part of the defendant, or that the defendant is estopped at this time from asserting the fact that the policy was not paid up at the time of the accident." (Tr. 74) [68]

Defendant was granted a request to withdraw his motion for a directed verdict at this time and to have the privilege of reopening the case.

Whereupon an adjournment was taken until ten o'clock A. M., January 19, 1940, at which time proceedings were resumed as follows:

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J. W. WATSON,

witness for Defendant

J. W. Watson, called as a witness on behalf of the defendant, being first duly sworn, testified as follows: (Tr. 76)

Some years ago I was connected with The United Commercial Travelers of America. I took the application of the deceased, Mr. Robert H. Campbell. I was secretary-treasurer and as part of my duties I was to keep a record of all the proceedings and collect all the moneys when assessments were called and make remittances to the Supreme Council. (Tr. 77)

(All further testimony of this witness pertained to matters not a part of this appeal and therefore omitted).

Defendant renews its motion for a directed verdict.

The Court: “Well, I think I understand you gentlemen’s contention. I have given you about two hours here this morning. It is just a question of whether this case should go to the jury, first, upon the credit, a sufficient amount due the insured to cover the last defaulted installment due at the time of his death; and second, whether or not the company, by its course of dealings in the past and its conduct, is estopped and has waived the provisions of the contract of insurance which requires payments to be made at the time they are due.

Now, I observed from the Supreme Court, that where an insured is in default in payment, and the company fails to give him notice or to object to his continuation of his default [69] before he dies, that the past course of conduct in each particular case—it is to be considered whether the company has waived and is estopped from asserting its provision in its contract of insurance of prompt payment of these premiums.

Now, we have here a notice that was given to this insured after he was delinquent on his last payment. On July 5 it was mailed; and previous to that time, it seems, under the testimony here, which is undisputed, similar kinds of notices were given to persons who held policies in this company, a matter that they call a courtesy notice. It doesn’t make any difference whether they call it a courtesy notice,

or whether they were obligated to give a notice or not. The question is, did they notify him?

If they notified him, and he received it before his death, to come in and pay this delinquent assessment, and he didn't do so, under this holding of the Supreme Court there wasn't any waiver or estoppel. They discuss the form of instruction given by the trial court, and approve that instruction; and in that instruction, the Court says without giving notice to the insured, they didn't object to the continuation of the policy by reason of the default payment.

Now, if this company hadn't given this notice, there is no question to my mind but what it is a question for the jury as to whether there is a waiver or estoppel.

Now, the next question is, did he get the notice before he died? The notice was given on the 5th of July, it is dated here, and mailed in this city. This man, the evidence shows, was out of the city at that time; and from there on until his death—his death occurred, I believe, in Oregon—he didn't receive it. It was afterwards taken out of the postal box here in an envelope, after his death, so apparently he didn't receive the notice. That is undisputed. [70]



Now, that being the case, if he had received the notice, doesn't this case come under these numerous decisions of your State Supreme Court—and I think there are other decisions I find also adopting that principle—where a company adopted a course of dealing and conduct with an insured, allowing him to make the payment of default premiums at certain times, over a course of years, and if a diligent, prudent person had reason to believe that the company would continue, and acting as a diligent, prudent person, relied upon that course of conduct in failing to pay this premium before the 12th of July.

As to that question, gentlemen, in failing to get this notice before his death, it would be a question for the jury. I will have to submit that to the jury. Under the present decisions of your State Supreme Court and other decisions, I am satisfied that from the condition this record is in I will have to submit that to the jury, with an instruction relating to it.

Now, as to the question of credit, I think mathematically, gentlemen, that this record has been explained by this company, and it is not disputed, that the amount deposited in issue, the payment of \$10.00, has been accounted for by this company under their by-laws and constitution. It has been accounted for; \$2.00 commencing on this policy, which went into effect in January, on Assessment 154. The other \$8.00 was properly accounted for as to its application. It is undisputed, the record is undisputed, and it would be a question for the jury;

there would be a legal question as to the credit, but there is no dispute except as to the number of the assessment 153 and 154, and afterward it was made to 154.

What the Court is concerned with, was this \$10.00 properly applied and charged properly against this insured on his policy, and under the by-laws and constitution of the company, [71] which was a part of his contract of insurance. I think the company has accounted for that, without any disputed testimony. Therefore a credit is not due.

Now, if during the period of suspension, whether they should charge, I see under the by-laws here that that is merely reinstating himself on paying him up. That is in the by-laws, so there wouldn't be a question of credit on any installment. The by-laws are clear, that that merely gives them the right to come in and reinstate themselves upon paying up the premiums that were due, covering also the period of suspension.

So, I am satisfied that the by-laws and constitution wouldn't allow a credit for the period of suspension. That is very clear, and that is part of the contract. So I think, gentlemen, I will have to submit this case to the jury upon one issue, whether or not there was a waiver or whether the company is estopped by reason of its back dealings and conduct in accepting these default payments or delinquent payments at the times it did over this course of years, and whether this man received proper notice of any changed conduct before he died. The

notice evidently says so, given on the 5th; but there is evidence here disputing whether he ever received it or not before he died. It was mailed on the 5th, and the man died on the 12th, seven days after.

I think it clear from the evidence that he did not receive it. It wasn't taken out of the post office until after his death, and delivered to the plaintiff here, sealed in an envelope, having gone through the postal service.

So I think I will submit the case to the jury on that issue. That is the way it appears to me on the undisputed testimony. You may call the jury in.

Now, don't you think you can argue this case in about thirty-five minutes on a side, instead of spending all afternoon? [72] There is just one issue.

Mr. McKelvy: "Yes, that is enough for me. I understand, Your Honor, thirty-five minutes?"

The Court: "Yes.

Mr. McKelvy: "That is enogh for me.

The Court: "I think that is the only issue, the way I look at the case, to go to the jury."

After argument, the court denied the motion as to all matters pertaining to the question of waiver and estoppel, submitting that matter to the determination by the jury, but granting the defendant's motion as to the plaintiff's claim of an existing credit in favor of the deceased member, Robert H. Campbell.

Argument of counsel. (Tr. 98)

Thereafter the court instructed the jury as follows:



The Court: “Ladies and gentlemen of the jury, I ask your patience for a few moments in presenting the instructions of the Court and the issue involved here and the principles of law applicable thereto.

This case has narrowed itself down, which I will call your attention to, to but one issue of fact for your determination. (Tr. 98)

You doubtless understand the investigation that we have been engaged upon involves a question of whether or not the plaintiff is entitled to recover the sum of \$5,000 alleged in her complaint, and I hardly need to say to you that, after listening to the trial of the case and the argument of Counsel, it is necessary to recall ourselves to the precise nature of our duties and responsibilities as jurors and judges, that responsibility being to decide the issues and controversies fairly from the evidence and under recognized principles of law. [73]

The function you perform in a case of this kind, the duty you perform is an important and necessary one. When you go to your jury room and come to consider your verdict you will lay aside all suggestions which merely appeal to your feelings or prejudices or emotion, regardless of on which side they may have come in the case, and pass on it. Sometimes incidents inadvertently come into the trial of a case which really have no bearing on it; and unless we are careful, our judgment may be somewhat disturbed thereby. So, when you come to the consideration of what your verdict should be, you

should be careful to confine that consideration to the evidence, and all of the circumstances in evidence, and only the fair inferences that may be drawn therefrom.

For me to analyze in detail the pleadings in the case and the evidence would necessarily make the instructions unreasonably long. Therefore I shall avoid doing anything more than bringing to your attention a fair outline of the real issues and of the principles of law which are applicable and which you will follow and apply to the evidence in making up your verdict.

When you go to your jury room, if you desire, you may have the pleadings in the case. (Tr. 99)

Now, you recall that we are now considering a contract of insurance; and, as part of that contract of insurance, the constitution and by-laws of the defendant company are a part thereof; and as a part of that constitution and the contract here, we find in part, at the time of the death of Robert H. Campbell the following provisions:

‘Any member who fails to pay fees, fines, costs, dues, or any assessment charged or levied against him, when and as same become due and payable, shall immediately upon such default and by virtue thereof become a delinquent member, and [74] he, and his beneficiaries, or anyone claiming under his membership or certificate of insurance shall, at the time of such default and by virtue thereof, forfeit all right to indemnity or benefits of every character. While

he thus continues a delinquent member the sending to him of notice of any assessment or the making on him for any fees, fines, costs, dues or assessments shall not constitute or be a waiver of such forfeiture.

‘Should any delinquent member at any time, regain his good standing in The Order, his restoration shall in nowise operate to entitle him or anyone claiming by, to or under him or his certificate of membership or insurance to indemnity or benefits on account of any accident or injury received by him while not in good standing, or on account of death resulting therefrom.’ (Tr. 100)

We find that it is further provided in the constitution and by-laws of the company, in existence at the time of the death of Robert H. Campbell, and it is a part of this contract, the following provision:

‘Should any delinquent member fail to restore himself to good standing within thirty days from the date of such delinquency, the secretary-treasurer of his local council shall immediately suspend him from membership and insurance in The Order. Said secretary-treasurer shall at once notify the Supreme Secretary of such suspension and report the same to his local council at its next regular meeting.

[75]

‘Failure to suspend a delinquent member, under the provisions of this action, shall not



constitute nor be deemed a waiver of the forfeiture provided for in this section.'

I will say to you that you are instructed that there is but one issue of fact for you to determine in this case, from the evidence and under the instructions of the Court, and that is, 'Did the defendant company waive its right to insist upon the forfeiture of the certificate of insurance by reason of the non-payment of the last assessment?' And if you find that the defendant company did not waive such right, then your verdict will be for the defendant. On the other hand, should you find that it did waive such right, then your verdict will be for the plaintiff. (Tr. 101)

I will say to you further that if you find, from a fair preponderance of the evidence, that Robert Henry Campbell habitually paid the assessments and dues due under the certificate of insurance at periods ranging from time to time later, and that the defendant company received them without putting into effect the penalty provisions set forth in its constitution and by-laws and without forfeiting the certificate and requiring Robert Henry Campbell to formally apply for reinstatement, and if you further find that, by such course of dealing, Robert Henry Campbell, as a prudent person, was led to believe and did believe that he was making these payments in a manner satisfactory to the company, and that the custom and conduct of the company in receiving these payments without insisting upon

the penalties and forfeitures required by the constitution and by-laws were calculated to lead an ordinarily prudent person to so understand and believe, and that he was thereby induced so to believe at all times prior to his death, and that at the time of [76] his death he was induced to believe and did believe that the certificate was in full force and effect, then the company is estopped and has waived its right to insist upon the forfeiture of the certificate by reason of the non-payment of the last assessment, and in that case your verdict should be for the plaintiff. (Tr. 102)

Now, in passing upon the issues in this case, the burden is upon him who asserts the existence of the fact to establish it; and in a civil action of this kind such as we are considering, to establish it by a preponderance of the evidence. The burden is therefore upon the plaintiff in the first instance to show, by a preponderance of the evidence, the cause of action set forth in her complaint; and in determining the credibility to be given to the testimony of any witness, you have a right to take into consideration his or her interest if any in the result of the case, his or her demeanor on the witness stand, his or her candor or lack of candor and all other facts and circumstances which would influence you in determining whether or not the witness has told the truth. Bring to bear your common sense and experience in hearing the testimony and passing upon the credibility of the witness.

Now, preponderance of the evidence does not necessarily mean the greater number of witnesses, but a greater weight of the evidence. That is what the word preponderance means, evidence which convinces you that the truth lies upon this side or that. It is that which is more convincing, more persuasive.

The burden therefore is upon the plaintiff in this case, in the first place, to show by a preponderance of the evidence that the defendant is liable in the respects charged in the complaint as to which I have called your attention, and under these instructions.

[77]

If your verdict should be for the plaintiff, then you are instructed that it shall be in the full sum of \$5,000. All of you must agree in finding a verdict. Forms of verdict have been prepared in the case. You will have no difficulty in using them. If you find in favor of the plaintiff, one will be used where the blank is left, in which you may insert the amount of \$5,000. If you find for the defendant, you will use the form of verdict in which there is no blank space. (Tr. 103)

When you agree upon your verdict, if you do, have your foreman sign it and return it into court. If you desire any of the exhibits, just notify the bailiff, and the clerk will send them in to you. Here are the forms of verdict, Mr. Bailiff, you may hand them to the jury. You may retire.

(Whereupon the jury retired to consider of its verdict.)



Mr. McKelvy: Your Honor, the defendant has some exceptions to take. Let the record show that the defendant at this time, in the presence and hearing of the Court, and before the jury retired, objects to the refusal in giving the following instructions, for the following grounds and reasons:

First, as to the instructions in which the court submitted the question to the jury as to whether or not the defendant pursued any course of conduct or action that could be construed as a waiver of the prompt payment of premiums, for the reason that there is no evidence in the record to justify the instruction.

Second, the court's instruction relative to advising the jury that they might find that the defendant had waived its right to prompt payment, for the reason that if they found that it failed to enforce a penalty or to enforce the provisions of its constitution and by-laws or of its contract, this is particularly an erroneous statement of law, for the reason that under the particular contract in question, the defendant was bound to accept late payments, by virtue of its contract, and [78] in the acceptance of these late payments, it would be purely in performance of the provisions of its contract, and could not under any theory be construed as a waiver. (Tr. 104)

Furthermore, if there was any failure to invoke the suspension rule, as outlined by the contract, this would have nothing to do with any alleged waiver of the question of coverage while the policy or the con-

tract was in default. It would merely mean that the insured would have a right, or might have a right to re-instatement any time up until he was actually cancelled out by suspension.

Now, as to the refusals of the court to give requested instructions, I except to the refusal of the court to instruct the jury, as a matter of law, that the policy at the time of the death of Mr. Campbell, July 12, 1938, was not paid, and that there were no premiums paid on it at that time. I think the record is undisputed on this fact; and inasmuch as the case went to the jury purely on the question of waiver and claimed reliance, I think we have a right to have the jury told specifically that there were no premiums paid.

I except further to the refusal to give requested instruction No. 4, in which the defendant requested the jury be instructed that, unless it could find that the defendant pursued some course of conduct in the acceptance of the deceased's premiums which was inconsistent with the various provisions of the insurance certificate and the constitution and by-laws, there could be no waiver or estoppel. I think that this is clearly a correct statement of the law. If the jury find only that what the defendant did was provided for as a right or obligation on the part of one or both of the parties to the contract, then obviously there could be no waiver or estoppel. Therefore I think it is rather prejudicial not to give that instruction. (Tr. 105) [79]

I except to the failure to give requested instruction No. 5, which again would have advised the jury that if the jury merely found that the defendant did only those things which it was entitled to do under its contract, or was bound to do by the provisions thereof, there could be no waiver. It seems to me that there is the whole question here under the evidence. The jury might well find that the acceptance of all the premiums was done in compliance with the specific provisions of the contract; and if so, certainly there could be no waiver or estoppel. I therefore except on the grounds it is highly prejudicial to refuse the request. (Tr. 106)

Instructions No. 4 and 5 requested by the defendant and refused by the court are as follows:

#### No. 4

You are instructed that unless you find from the evidence that the defendant in this case pursued some course of conduct in the acceptance of the deceased's premiums which was inconsistent with the various provisions of the insurance certificate and constitution and by-laws, then there can be no waiver or estoppel.

#### No. 5

You are instructed that if you find that the defendant did only those things which it was entitled to do under the provisions of the insurance certificate and constitution and by-laws, then there can be no waiver or estoppel in the case.



## VERDICT

We, the jury in the above entitled cause, find for the plaintiff and fix the amount of her recovery in the sum of \$5,000.00.

[Endorsed]: Filed Jun 18, 1940. [80]

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[Title of District Court and Cause.]

STIPULATION ON CONTENTS  
OF RECORD ON APPEAL

Pursuant to Rule 75 (f) of the Rules of District Courts it is hereby stipulated and agreed between the parties hereto, through their respective attorneys of record, that the record on appeal to be certified by the Clerk of the above entitled court and forwarded to the Clerk of the Circuit Court of Appeals for the Ninth Circuit shall contain the following parts of the record, proceedings and evidence:

1. Complaint.
2. Petition for Removal to Federal Court.
3. Order for Removal to Federal Court.
4. Bond on Removal.
5. Amended Answer.
6. Amended Reply.
7. Demand for Jury Trial.
8. Request for Admission under Rule 36.
9. Stipulation on Trial.

10. Verdict.
11. Judgment.
12. Motion for Judgment N. O. V.
13. Motion for New Trial.
14. Order Denying Motion for Judgment N.O.V.  
and New Trial.
15. Notice of Appeal.
16. Supersedeas and Cost Bond on Appeal.
17. Order Forwarding Original Exhibits.
18. Stipulation Extending Time for Filing Record on Appeal.
19. Order Extending Time for Filing Record on Appeal.
20. Stipulation Regarding Printing of Record.
21. Statement of Points on Appeal.
22. Plaintiff's Exhibits "1" to "7", inclusive.
23. Defendant's Exhibits "B-1" to "B-6", inclusive.
24. Reporter's Transcript of Evidence and Proceedings.
25. Plaintiff's Abstract of Testimony.
26. This stipulation.

It is further stipulated and agreed that the plaintiff's [81] abstract of testimony shall be printed in the record on appeal in lieu of the reporter's transcript.

It is further stipulated and agreed that the parts of the exhibits as set forth in the record on appeal include all the necessary and pertinent parts of the

various exhibits introduced necessary to the court's consideration of the questions raised in this appeal.

JONES & BRONSON,  
WHEELER GREY,

Attorneys for Plaintiff.

W. R. McKELVY &

FREDERICK V. BETTS,

Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 12, 1940. Millard P. Thomas, Clerk. By R. Elias, Deputy. [82]

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CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 193, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by stipulation of counsel filed and shown herein, as the same remain of



record and on file in the office of the Clerk of said District Court at Seattle, except as to the Reporters Transcript of proceedings at trial, the original of which is enclosed herewith, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 539 folios at .5¢.....	\$ 26.95
Appeal fee (Sec. 5 of Act).....	5.00
Certificate of Clerk to Transcript of Record .....	.50
<hr/>	
Total .....	\$ 32.45

I hereby certify that the above cost for preparing and certifying record, amounting to \$32.45, has been paid to me by the attorneys for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 21st day of June, 1940.

[Seal]

MILLARD P. THOMAS,

Clerk of the United States  
District Court for the West-  
ern District of Washington.

By R. ELIAS,

Deputy.

---

[Endorsed]: No. 9557. United States Circuit Court of Appeals for the Ninth Circuit. The Order of United Commercial Travelers of America, Appellant, vs. Estelle Campbell, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed June 24, 1940.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit.

No. 9557

THE ORDER OF UNITED COMMERCIAL  
TRAVELERS OF AMERICA,

Appellant,

vs.

ESTELLE CAMPBELL,

Appellee.

### STATEMENT OF POINTS ON APPEAL

Comes now the appellant, The Order of United Commercial Travelers of America, and files this statement of points on which it intends to rely on its appeal from a certain final judgment of the District Court of the United States for the Western District of Washington, Northern Division in Cause No. 20, entitled “Estelle Campbell, Plaintiff v. The Order of United Commercial Travelers of America, Defendant”, as follows:

1. That as a matter of law the District Court erred in failing to direct a verdict for the defendant in said cause at the close of all the evidence where the evidence affirmatively showed that the deceased, Robert H. Campbell, was doing those things which he had a contractual right to do, and where there was no showing that the defendant at any time had waived its rights under the policy upon which said suit was predicated;

2. That as a matter of law the plaintiff in said cause failed to prove by the evidence any of the ele-



ments of the doctrine of waiver and estoppel and failed to establish a jury question relative to that subject;

3. All of the court's instructions to the jury in said cause on the question of estoppel and waiver are erroneous in this case where the deceased had an affirmative contractual right and was exercising that right and where there was no showing that the defendant did any more or less than was provided for under the terms of the insurance contract in said cause.

W. R. McKELVY &

FREDERICK V. BETTS,

Counsel for Appellant.

June 3, 1940. Copy received.

JONES & BRONSON.

[Endorsed]: Filed Jun. 24, 1940. Paul P. O'Brien,  
Clerk.

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[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

To the Clerk of the above entitled Court:

For a record on appeal herein, the appellant hereby requests that you do print the entire transcript of record on the above appeal as certified to you by the clerk of the District Court of the United

States, for the Western District of Washington,  
Northern Division.

Respectfully submitted.

W. R. McKELVY &

FREDERICK V. BETTS,

Counsel for Appellant.

June 3, 1940. Copy received.

JONES & BRONSON.

[Endorsed]: Filed Jun. 24, 1940. Paul P. O'Brien,  
Clerk.





United States  
Circuit Court of Appeals  
For the Ninth Circuit

THE ORDER OF UNITED COMMERCIAL  
TRAVELERS OF AMERICA,

*Appellant,*

vs.

ESTELLE CAMPBELL,

*Appellee.*

Upon Appeal from the United States District Court,  
for the Western District of Washington,  
Northern Division

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HON. CHARLES D. CAVANAH,  
District Judge

---

Brief of Appellant

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SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,  
*Attorneys for Appellant*

914 Insurance Building,  
Seattle, Washington.



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United States  
Circuit Court of Appeals  
For the Ninth Circuit

THE ORDER OF UNITED COMMERCIAL  
TRAVELERS OF AMERICA,

*Appellant,*

vs.

ESTELLE CAMPBELL,

*Appellee.*

Upon Appeal from the United States District Court,  
for the Western District of Washington,  
Northern Division

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HON. CHARLES D. CAVANAH,  
District Judge

---

BRIEF OF APPELLANT

STATEMENT OF PLEADINGS DISCLOS-  
ING JURISDICTION.

The appellee, Estelle Campbell, served and filed in the Superior Court of the State of Washington for King County her complaint in which she pleaded that she was a citizen of the State of Washington,

residing at Seattle, and that the appellant, The Order of United Commercial Travelers of America, was a corporation incorporated in the State of Ohio. (R1)\* She asked for a judgment against the appellant in the sum of \$6,300.00. Pursuant to the provisions of 28 U. S. C. A. Sec. 41 and 71 the action was removed to the United States District Court for the Western District of Washington, Northern Division, on the grounds that it involved over \$3,000.00 and that there was a diversity of citizenship.

On January 26, 1940, judgment was entered upon the verdict in favor of the appellee and thereafter on March 18, 1940, an order was entered denying the appellant's motion for judgment notwithstanding the verdict of the jury and motion for a new trial. (R26&31).

On April 16, 1940, notice of appeal was filed with the clerk's office, and on April 20, 1940, a supersedeas and cost bond on appeal was filed, thus perfecting the appellant's appeal to this Court. (R31&32).

## STATEMENT OF THE CASE

The appellant is a fraternal benefit association, incorporated under the laws of Ohio, with its home office at Columbus, Ohio. The organization is governed by a body known as The Supreme Council.

\*Reference to pages in Transcript of Record.

Throughout the country there are many local councils, one of which is located in Seattle, Washington, designated as Seattle Council No. 83. All local councils are subject to The Supreme Council and the rights, privileges and duties of the various councils and their members are determined by the constitution and by-laws, which are from time to time amended. The Order of United Commercial Travelers of America is a secret organization, in which there are two types of membership, one being for fraternal purposes only and the other including in addition insurance protection against accidents and accidental death. The second form of membership was held by Robert Henry Campbell, the deceased husband of the appellee. (R80 to 83)

The expenses of local councils are met and paid through the levying of dues, which are collected, retained and used by them. The insurance protection is paid for by means of assessments, the amounts of which are determined by the constitution and by-laws and which are levied by the Supreme Council. They are paid to the secretary of the local council, who acts as a collecting agent, and forwarded by him to the Supreme Council. The local council has nothing whatever to do with the insurance, settlement, or payment of any claims, or the determination of any policies with reference thereto.



On January 3, 1920, the appellant issued its Insurance Certificate No. 155,949 to Robert Henry Campbell. This certificate together with the Articles of Incorporation, Constitution and By-Laws, as they were and as they might later be amended, constituted the contract between the appellant and the deceased. (R41)

The Constitution and By-Laws effective on the date of death of Robert Campbell provided for an annual assessment in the amount of \$16.00, payable annually, semi-annually or quarterly. In the case at bar, the assured paid his by quarterly installments, \$4.00 being payable on or before December 31, March 31, June 30, and September 30 of each year. The dues to the local council amounting to one dollar each quarter, were required to be paid on the same dates, and no member was permitted to pay them separately from the assessments. (R83)

The contract provided that any member who failed to pay the dues and assessments on or before their due date automatically became delinquent, no longer in good standing, and by reason thereof lost all right to participate in the insurance benefits during the period of delinquency. The provision was self-executing and did not require any act by the appellant to be effective.

The member could regain his good standing by payment of the delinquent dues and assessments within thirty (30) days from the date of default, and thereafter be entitled to benefits provided for in the insurance contract.

Following the provision relative to "delinquency" is one pertaining to "suspension." By its terms it could become effective only after and following the thirty (30) day period of delinquency. The suspension provision authorized the local secretary to suspend a member from membership and insurance after 30 days' delinquency. The Constitution specifically provides that failure of the local secretary to suspend a delinquent member shall not constitute or be deemed a waiver of the forfeiture provision affecting those members who are delinquent. (R62)

It was the practice of the Supreme Council to send quarterly installment notices similar to Defendant's Exhibit B-1 about thirty (30) days before the installment was due. In the case at bar, a similar notice was forwarded to the assured on or about June 1, advising him that Installment No. 233 had to be paid before June 30, 1938, and that failure to do so would invalidate his insurance. (R56)

The Supreme Council published a national monthly magazine, known as "The Sample Case" which was mailed to each member. This magazine always car-

ried in it a notice showing what installment was last called and when it expired (see Defendant's Exhibit B-2). (R57).

The appellant also produced as exhibits three separate issues of a local monthly magazine published by the local council called "Seattle Tickler" (Exhibit B-3, -4, -5) (R58 & 59) and each issue carried notices or articles with reference to the assessment then due or about to become due.

In addition to the notice sent out by the Supreme Council, and those included in the national and local magazines, the local secretary following the date of default mailed each delinquent member a notice, reminding him of his delinquency and of the non-existence of coverage. Mr. Geo. B. Dunn, secretary and treasurer of the Seattle Council mailed such a notice to the assured on July 5, which was delivered to the assured's home on July 6. (R55)

Robert H. Campbell died from drowning on July 12, 1938, while on a vacation trip in Oregon. It is not disputed that at the time of his death quarterly assessments No. 233 was unpaid. This assessment was due and payable on or before June 30, 1938. (R77)

The appellee in her complaint alleges that Robert Henry Campbell was insured by the appellant; that all of the dues and assessments were paid or tendered;



that the policy was in full force and effect on July 12, 1938, the date upon which said Robert Henry Campbell came to his death. The appellee further alleged that she furnished the appellant notice of the accidental death of said Robert Henry Campbell and that appellant refused to make any payment under the policy. (R1)

The appellant admitted the existence of said policy and pleaded the portions of the certificate, the Constitution and By-Laws of the Order, referring to the subject of payment of dues and assessments, delinquency and suspension, and alleged the deceased was in default at the time of his death by reason of his having failed to pay Assessment No. 233, which was payable on June 30, 1938, and that by reason thereof the policy was not effective as of July 12, 1938. (R12)

The appellee replied by alleging, first, a credit in favor of the assured which matter is not now before this Court on this appeal; and, secondly, waiver of the provisions of the Constitution and By-Laws of the appellant Order. (R19)

Upon examination by the appellee over the objection of the appellant, Mr. Dunn testified that from the inception of the contract to the date of death, Mr. Campbell had been delinquent in his payments on several occasions. A total of 79 payments were made by the deceased, and of these 27 were delinquent. The

period of delinquency for 24 of the payments ranged from 7 to 54 days, one payment was 71 days late, one 76, and another 102 days late. (R73 to 77)

Mr. Dunn also testified that the deceased had never been suspended from membership. (R82)

The local secretary further testified that it was customary to mail a delinquent notice soon after default. In this particular instance he did, on July 5, 1938, place in the U. S. Mail an envelope containing such a notice, addressed to the deceased at his residence in Seattle. (Plaintiff's Exhibits 6 and 7) (R55) The notice stated the time for payment of assessment No. 233 expired June 30, 1938; that it must be paid at once as he could not receive any benefits in case of an accident, and that he was not a member in good standing as provided in the Constitution and By-Laws.

The appellee testified that her husband had left Seattle on July 2, 1938, and that when she returned to their home in Seattle following his death the above referred to notice was at the residence, unopened. (R79)

There was no evidence that any benefits under the certificate of insurance were ever demanded or paid to the deceased during the life of his membership.

The evidence as above stated was all the evidence produced by the appellee in support of her contention

that the appellant waived its contractual rights. There were admitted as plaintiff's exhibits the insurance certificate (Pl. Ex. No. 1), (R41), certificate of membership (Pl. Ex. No. 2) (R44) and a copy of the Constitution and By-Laws effective September 1, 1919 (Pl. Ex. No. 3). (R45)

With reference to procedure in collecting and remitting dues and assessments Mr. Dunn testified that he forwarded reports and remittances to the home office at Columbus, Ohio, on or before the 15th of each month. In that report he indicated those members who were delinquent and also those members who were suspended. (R82)

## SPECIFICATIONS OF ERRORS

For its Specifications of Errors the appellant contends that:

### I.

The Court erred in permitting the examination of George B. Dunn, local secretary, by appellee's counsel on the subject matter of when the deceased paid the various dues and assessments, and as to the question of whether the deceased had ever been suspended. Substantially, Mr. Dunn testified, over the appellant's objections, that the deceased had made a number of late payments, being 27 in number; that the deceased



had never been formally "suspended" within the meaning of the Constitution or By-Laws, even though some of the dues and assessments were more than 30 days delinquent. The following exception was taken to this line of testimony. (R72 to 77)

"Mr. McKelvy: I want to interpose an objection at this time. Apparently, it is counsel's theory that because this man was late on other occasions, from time to time, that there was a waiver of some kind. In view of the provisions of the contract itself, I object to the question and this line of testimony on the ground that it is wholly immaterial, irrelevant and incompetent, as to the fact that he may have been late on other occasions." (R71)

## II.

That the court erred in denying the appellant's motion for a dismissal and in refusing an instruction to the jury directing a verdict for the appellant as a matter of law. The following motion and grounds therefore, was made by the defendant:

"Mr. McKelvy: Comes now the defendant, all parties having rested, and at this time challenges the legal sufficiency of the plaintiff's testimony to make out a case to go to the jury, and moves the court to dismiss the action and to instruct the jury to return a verdict in favor of the defendant as a matter of law, on the grounds and for the reasons that the plaintiff has failed to sustain the burden of showing that the policy in question, or the insurance certificate in question, was in good standing and in full force and effect at the time of the death of the decedent, for the

reason that the defendant has affirmatively shown that the policy was not paid up, that it was in default, and that the member was delinquent at the time of his death. The plaintiff has failed to sustain her allegation that there was a waiver on the part of the defendant, or that the defendant is estopped at this time from asserting the fact that the policy was not paid up at the time of the accident.” (R84)

### III.

That the court erred in instructing the jury, that

“I will say to you that you are instructed that there is but one issue of fact for you to determine in this case, from the evidence and under the instructions of the court, and that is: Did the defendant company waive its right to insist upon the forfeiture of the certificate of insurance by reason of the non-payment of the last assessment, and if you find that the defendant company did not waive such right, then your verdict will be for the defendant. On the other hand, should you find that it did waive such right, then your verdict will be for the plaintiff.” (R94)

“I will say to you further that if you find from a fair preponderance of the evidence that Robert Henry Campbell habitually paid his assessments and dues due under the certificate of insurance at periods ranging from time to time later, and that the defendant company received them without putting into effect the penalty provisions set forth in its Constitution and By-Laws, and without forfeiting the certificate and requiring Robert Henry Campbell to formally apply for reinstatement; and if you further find that by such course of dealing Robert Henry Campbell, as a prudent person, was led to believe and did believe that he was making these payments in a manner satisfactory to the company, and that the custom and conduct of the company in receiving these pay-



ments, without insisting upon the penalties and forfeitures required by the Constitution and By-Laws, were calculated to lead an ordinarily prudent person to so understand and believe, and that he was thereby induced so to believe at all times prior to his death, and that at the time of his death he was induced to believe and did believe, that the certificate was in full force and effect, then the company is estopped and has waived its right to insist upon a forfeiture of the certificate by reason of the nonpayment of the last assessment, and in that case your verdict will be for the plaintiff." (R94)

To which the following exceptions were taken:

"Mr. McKelvy: First, as to the instructions in which the court submitted the question to the jury as to whether or not the defendant pursued any course of conduct or action that could be construed as a waiver of the prompt payment of premiums, for the reason that there is no evidence in the record to justify the instruction. (R97)

"Second, the court's instruction relative to advising the jury that they might find that the defendant had waived its right to prompt payment, for the reason that if they found that it failed to enforce a penalty or to enforce the provisions of its Constitution and By-Laws, or of its contract, this is particularly an erroneous statement of law, for the reason that under the particular contract in question the defendant was bound to accept late payments by virtue of its contract and in the acceptance of these late payments it would be purely in performance of the provisions of its contract and could not under any theory be construed as a waiver.

"Furthermore, if there was any failure to invoke the suspension rule, as outlined by the contract, this would have nothing to do with any alleged waiver of the question of coverage while



the policy or the contract was in default. It would merely mean that the insured would have a right, or might have a right, to reinstatement at any time up until he was actually cancelled out by suspension.” (R97)

#### IV.

The court erred in refusing to give the appellant’s requested instruction No. 4 as follows:

“You are instructed that, unless you find from the evidence that the defendant in this case pursued some course of conduct in acceptance of the deceased’s premiums which was inconsistent with the various provisions of the insurance certificate and Constitution and By-Laws, then there can be no waiver or estoppel.” (R99)

To which the following exception was taken:

“Mr. McKelvy: I except further to the refusal to give requested instruction No. 4, in which the defendant requested the jury be instructed that unless it could find that the defendant pursued some course of conduct in the acceptance of the deceased’s premiums which was inconsistent with the various provisions of the insurance certificate and the Constitution and By-Laws, there could be no waiver or estoppel. I think this is a clearly correct statement of the law. If the jury find only that what the defendant did was provided for as a right or obligation on the part of one or both of the parties to the contract, then obviously there could be no waiver or estoppel. Therefore, I think it rather prejudicial not to give that instruction.” (R98)

#### V.

The court erred in refusing to give the appellant’s

requested instruction No. 5, which reads as follows:

“You are instructed that if you find that the defendant did only those things which it was entitled to do under the provisions of the insurance certificate and Constitution and By-Laws, then there can be no waiver or estoppel in the case.” (R99)

The following exception was taken:

“Mr. McKelvy: I except to the failure to give requested instruction No. 5, which again would have advised the jury that if the jury merely found that the defendant did only those things which it was entitled to do under its contract, or was bound to do by the provisions thereof, then there could be no waiver. It seems to me that there is the whole question here under the evidence. The jury might well find that the acceptance of all the premiums was done in compliance with the specific provisions of the contract, and if so, certainly there could be no waiver or estoppel. I therefore except on the ground that it is highly prejudicial to refuse the request.” (R99)

## VI.

That the court erred in denying the appellant's motion for judgment notwithstanding the verdict of the jury, or in the alternative, a motion for a new trial, which motions were as follows:

1. The defendant, The Order of United Commercial Travelers of America, moves the court herein to render and enter judgment in favor of the defendant herein, dismissing the above entitled action with prejudice, in accordance with this defendant's motion for a directed verdict, made at the time of the trial, notwithstanding the verdict of the jury herein. (R28)

2. Comes now the defendant The Order of United Commercial Travelers of America, and without waiving its challenge to the legal sufficiency of the evidence; without waiving its motion for a directed verdict made during the trial of the above entitled cause, and without waiving its motion for judgment notwithstanding the verdict but expressly relying thereon, this defendant herein does hereby move that it be granted a new trial in the above entitled cause for the following reasons materially affecting the substantial rights of this defendant:

1. Irregularity in the proceedings of the court and adverse party by which this defendant was prevented from having a fair trial;

2. Substantial errors and rulings on evidence at the trial;

3. Substantial errors in giving the court's instructions;

4. Substantial errors of the court in refusing to give certain of the defendant's requested instructions to the jury;

5. That the verdict of the jury was and is contrary to law;

6. That said verdict is contrary to the evidence in the case;

7. Misconduct of counsel, court and jury;



8. That the verdict appears to have been given under the influence of passion or prejudice;

9. Newly discovered evidence, surprise and newly discovered law;

10. Accident or surprise which ordinary prudence could not have guarded against;

11. Insufficiency of the evidence to justify the verdict, or that it is against the law;

12. Error in law occurring at the trial and excepted to at the time by the party making this application. (R29)

### ARGUMENT

All specifications of error embody the same subject matter, and the appellant's argument as to one will apply with equal force to all the remaining specifications; therefore, they will all be discussed together.

This argument is based upon the proposition that every man has the right to enter into any contract that he so desires, if not contrary to public policy, and is bound by its terms. Appellant's contention is that on July 12, 1938, Robert Campbell was acting within the terms of the contract entered into between himself and the appellant and that he was exercising those rights which were his by the very terms of that contract. Appellant further contends that, in order to find that it waived any of the provisions of the con-

tract, as is contended by the appellee, there must be a voluntary relinquishment of a known right by the appellant. On July 12, 1938, this appellant had no affirmative right which it could by its own conduct voluntarily relinquish. It is the further contention of the appellant that the provisions relative to suspension were not, effective as of the date of death. The question of whether the appellant had, by its previous acts, waived its rights under these provisions has no bearing upon the decision in this case. By the terms of the contract between the deceased and the appellant, the local council and its officers were prevented from waiving any of the provisions relating to the matter of insurance.

As the action herein is one brought to enforce payment of a sum of money in accordance with an agreement or contract entered into between the appellant and the deceased, Robert Henry Campbell, whose beneficiary under that contract is the appellee, it is necessary that a careful study and examination be made of the provisions of the contract which by the terms of the certificate consist of an application, an insurance certificate, Articles of Incorporation and the Constitution and By-Laws of the Appellant Order, as amended from time to time. (Pl. Ex. 1) (R41) It was established that the Constitution and By-Laws effective September 1, 1937, were in full force and effect at the time of Mr. Campbell's death. (R60)

Referring to Page One of the insurance certificate, Article 2, Sec. 8 of the 1937 Constitution and By-Laws, and Article 7, Sec. 3 of the 1919 Constitution and By-Laws, there will be found provisions designated "Delinquency." (R44, 61, 47). In all three instances they provide that if any insured member fails to pay any of the fees, dues or assessments when they become due and payable, he shall "immediately on the happening of such default and by virtue thereof become delinquent and cease to be in good standing as an insured member" and that every person claiming through his membership or his certificate of insurance at the time such default occurs or exists, shall be denied or suspended from any and all rights to indemnity or benefits. It further provides that "should such delinquent member at any time regain his good standing as an insured member in the Order, his restoration thereto shall in nowise operate to entitle him or anyone claiming by, through or under him" to indemnity or benefits on account of any accident, injury or death occurring while not in good standing.

The contract of the appellant Order also stipulated that a delinquent member may restore himself to good standing within thirty days from the date of delinquency by payment of the delinquent dues and assessments. (Def. Ex. B-6 Art. II, Sec. 8). (R62) Considering these parts of the contract, which are clear and unequivocal, any member who fails to pay,



for instance, the assessment payable on or before June 30 becomes a delinquent member immediately thereafter and is in default. Any time up to July 30th, he may pay his delinquent dues and assessment and automatically again become a member in good standing. The penalty for being in default is that for any accident sustained or any accidental death occurring during the period of delinquency there can be no recovery of benefits under the policy or contract. These clauses are self-executing and are not dependent upon any affirmative action either by the appellant Order, or the insured member.

The 1937 Constitution and By-Laws go on to provide in Art. 2, Sec. 8, under the heading of "Suspensions" (R62) that any delinquent member who fails to restore himself to good standing within thirty days from the date of delinquency shall immediately be suspended by the Secretary-Treasurer of the local council from membership in the Order and he shall at once notify the Supreme Secretary of such suspension and report the same to the local council at its next regular meeting. As a part of that section we find that "failure to suspend a delinquent member under the provisions of this section shall not constitute nor be deemed a waiver of the forfeiture provided in this section." (R62) In other words, continuing with the above example, if by July 31st the assured had failed to pay his delinquent assessment, then it is the duty of

the local secretary to immediately suspend him and to so notify the Supreme Council.

It is very important in this case to note the difference between "delinquency" and "suspension." The two provisions do not apply simultaneously and the provision relative to "suspension" becomes effective only after the expiration of thirty days following the date the member is first in default, and then only after an affirmative act by the local secretary. The former provision is self-executing, while the latter is not.

Article II, Section 9 of the 1937 Constitution and By-Laws provides that anyone desiring to be reinstated within ninety days from the date of suspension may do so by signing a statement prepared by the Executive Committee and under certain circumstances furnish a satisfactory health certificate. Anyone desiring reinstatement after the ninety day period may do so by making application on a blank prepared by the Supreme Executive Committee, together with payment of a reinstatement fee, followed by an investigation by the Committee. (R63)

It is to be remembered that assessment No. 233 was due and payable on or before June 30, 1938, but in this case was never paid. Mr. Campbell died as the result of an accident on July 12, 1938.

1. *Parties may include any provision in a contract not contrary to public policy.*

It is a constitutional right of every man to enter into any contract he sees fit, so long as it is not contrary to law, nor contrary to public policy. Robert Henry Campbell, on the 3rd day of January, 1920, exercised that right, and became a party to the contract in question.

With reference to the "delinquency" and "suspension" provisions of the contract, there are no existing statutes forbidding or prohibiting them. Many courts have considered the question of whether such provisions are contrary to public policy. In all instances disclosed by our research these courts have held them to be proper, and in no way contrary to public policy.

In the case of *Conway v. Minn. Mutual Life Ins. Co.*, 62 Wash. 49, 112 Pac. 1106, one of the terms of the contract was that any person may be re-admitted as an insured in the discretion of the defendant officers, upon the furnishing of satisfactory evidence of good health, plus payment of all delinquent assessments. Therein the opinion reads:

"The right of reinstatement depends upon the provisions of the contract. Since the right is not absolute the insurer may impose such conditions as it sees fit not contrary to public policy on which reinstatement may be had."

The provision of the contract in the Conway case is found in the Articles of Incorporation and provides



that any person may be re-admitted in the discretion of its officers and upon his furnishing satisfactory evidence of his good health plus payment of all delinquent assessments.

The Louisiana Court in *Richardson v. American National Insurance Company*, 137 So. 370, affirmed a judgment in favor of the defendants. In that case death of the assured occurred February 20, 1929, at 4:45 P. M. The premium was due and payable February 15th at 12 noon and by the terms of the policy there was an additional five-day grace period which would extend the time of payment to February 20th at 12 o'clock. The plaintiff pleaded estoppel based upon the fact that the defendant had accepted delinquent premiums as many as fifteen days after due date over a period of four years time. The premiums were paid tardily from three to fifteen days each month without protest. The terms of the policy were as follows:

“If default be made in the payment of the agreed premiums for this policy the subsequent acceptance of a premium by the company or by any of its duly authorized agents shall reinstate the policy, but only to cover accidental injuries thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.”

The court in holding the clause should be given legal effect since the provisions in the policy constituted the

law between the parties thereto and the stipulation was not against public policy, said:

“Finally plaintiff’s attorneys say that since the policy provides for a ten-day suspension of liability after the arrear premiums are paid, that, as practically all the payments were very late, the insured was paying full protection and not getting it, and that where the payment was twenty days later, the insured was not covered that month at all, but was required to pay the full premium. Therefore, such clause in any policy would tend to cause the company to encourage delinquency and that such a contract is unconscionable and against public policy.

“Whatever merit there may be in this contention, we feel that it is unnecessary for us to consider, for our Supreme Court and the several Supreme Courts rendered the decisions cited, *supra*, appear to have approved such a provision and therefore as this is not an original question we simply follow the authorities on the subject.”

Also to the same effect are the cases of *Thomas v. First National Life Health & Accident Insurance Company*, 157 So. 409, La. 1934, and *Freedman v. Mutual Benefit Health & Accident Association*, 119 S. W. (2d) 1017 citing scores of additional authorities.

In *American National Insurance Company v. Otis*, 183 S. W. 183, a judgment for the plaintiff was reversed in favor of the defendant. The deceased was reinstated on January 4, 1915, and death occurred January 19, 1915. The policy provided that “In case death should occur from any cause whatever with-

in five weeks from the date of reinstatement, the company shall not be liable to any extent whatever on account of such death." The court in rendering its opinion referred to the Washington case of *Conway v. Minnesota Mutual Life Insurance Company*, 62 Wash. 49, 112 P. 1106, with approval and stated that such a provision is not contrary to public policy.

See also *Plumley v. Brotherhood of American Yeoman*, 229 N. W. 727, Iowa 1930.

2. *Terms of contract unambiguous.*

The terms of the contract between appellant and Robert Henry Campbell are unusually clear and free of any ambiguity. The language used is susceptible to only one interpretation. The United States Circuit Court of Appeals for the Tenth Circuit in 1931 in the case of *Order of United Commercial Travelers of America, Inc. v. Edwards*, 51 F. (2d) 187, considered the same constitution and by-laws as is involved in the case at bar. The court therein said at page 189:

"It is well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense. (Citing cases.) There being no ambiguity in the language used there is no room for construction. \* \* \* \*"



In *Order of United Commercial Travelers v. Belue*, 263 Fed. 502, the Fourth Circuit Court adopted the above rule in construing the identical contract under consideration in the case at bar.

Again, in the case of *Freedman v. Mutual Benefit Health & Accident Association*, 119 S. W. (2d) 1017 (Mo. 1938), the court reverses a lower court judgment for the plaintiff. The policy provided that no benefits were to be paid until after ten days following reinstatement. The insured was reinstated October 16, and his illness commenced October 22. On October 28 the insured's wife notified the company of his illness, after which the company forwarded claim blanks requesting that they be completed. They did not at that time mention the ten-day provision, and the plaintiff contended that the company had waived it. The court stated that it was without authority to rewrite contracts.

To the same effect, see *Jones v. Travelers Protective Association of America*, 70 Fed. (2d) 74, in which it is stated that where there is no ambiguity, insurance contracts of beneficial associations must be interpreted according to the ordinary meaning of simple words. The court therein refers to a great number of cases sustaining this general rule.

3. *Appellant had no Right to Waive, at Time of Campbell's Death.*"

It is a well established rule of law that in order to constitute a waiver there must be an intentional relinquishment of a known right. Where no right exists it necessarily follows that there cannot be a waiver. In *Reynolds v. Travelers Insurance Company*, 176 Wash. 36, 78 Pac. (2d) 310, the Supreme Court of Washington said:

“A waiver is a voluntary relinquishment of a known right and may be either expressed or implied. An express waiver is governed by its own terms and hence is not often the subject of much dispute. An implied waiver may arise where one party has pursued such a course of conduct as to evidence an intention to waive a right, or where his conduct is inconsistent with any other intention than to waive it. An estoppel is a preclusion by act or conduct from asserting a right which might otherwise have existed to the detriment and prejudice of another who, in reliance on such act or conduct, has acted upon it. A waiver is unalateral and arises by the intentional relinquishment of a right, or by a neglect to insist upon it, while an estoppel presupposes some conduct or dealing with another by which the other is induced to act or forbear to act.”

In *Shafer Bros. Land Co. v. Universal Picture Corp.*, 188 Wash. 33, 61 Pac. (2d) 598, the Washington Court in determining whether or not one party to a lease had waived certain of its provisions, said:

“The remaining question is whether the performance of the covenant was waived \* \* \* \*. To constitute a waiver there must be an existing right and an intention to relinquish that right.”

In *Eakle v. Hayes*, 185 Wash. 520, 55 Pac. (2d) 1072, the same court said:

“A waiver is the voluntary or intentional relinquishment of a known right.”

See also *Knutsen v. Truck Ins. Exchange*, 199 Wash. 1, 90 Pac. (2d) 282.

It is indeed difficult to see how it can logically be said that the appellant in the case at bar pursued such a course of conduct as to lead one to believe that there was a voluntary relinquishment of a known right. The question is, what right did the appellant have at the time Robert Campbell met his death which they could have waived? The contract *gives the member* the right to reinstate his contract by paying a premium which was in default. In thus reinstating his membership within the specified time of thirty days following the default, he avoided the necessity of making a new application for insurance and subjecting himself to all of the things incidental to a new application. *This right of reinstatement is a right which belongs to the member* and is not a provision of the contract which runs in favor of the appellant. Obviously, the insured member had a right to tender the quarterly premium to the appellant, even after his certificate was delinquent, and he had a right to force the appellant to accept that premium and reinstate him and place him in good standing at any time



within the time specified in the contract. Looking to the date upon which this member met his death, which was July 12, 1938, we find that he was then 12 days delinquent, as Assessment No. 233 had been called and was due on June 30.

On the date of his death and for 18 days thereafter, had he lived, this member would have had the right to tender his delinquent assessment to the local secretary and, without any further action, require the secretary to place him in good standing. It was the self-executing provision affecting delinquency, which was in effect on the day Robert Campbell met his death. By the very terms of the contract all effective provisions on that date were in favor of the insured member. The appellant had no right to make demands for the payment of that assessment, and it could not have cancelled the policy or suspended this member from membership as of the date of his death. The only right which the appellant had at that time was to deny any benefits for any injuries or accidental death occurring during the period of default.

The appellee claims that the appellant has waived its right to set up the forfeiture provisions, by reason of the fact that it had on many occasions received late payment of dues and assessments. She argues that because the appellant had failed to "suspend" the member, it had waived its rights under the delinquency

provisions. Whether or not the appellant waived its rights to suspend without notice at the expiration of thirty days following default has no bearing herein as the suspension provision could not have been effective on July 12, the date of death.

There are many cases, both state and federal, which have decided the very issues here involved, in all of which it has been held that a compliance with contractual provisions cannot possibly constitute a waiver. An almost parallel situation arises in the case of *Bunge v. Brotherhood of Maintenance of Way Employees*, 178 Wash. 33, 33 Pac. (2d) 383, decided by the Supreme Court of Washington sitting en banc on June 19, 1934. Because of its similarity to the case at bar we include a considerable portion of the opinion in this brief. An action was brought to recover on a death benefit certificate issued by the brotherhood upon the life of the plaintiff's deceased husband. We quote from the opinion:

“According to the by-laws, there is but one class of dues and all dues are payable quarterly in advance, and if not paid within the month when they fall due, the member thus delinquent ceases to be in good standing and thus loses his right to a seat in the lodge and the privilege of interesting the grievances committee in his affairs. If the delinquency continues for six months the member is dropped from the rolls without notice and his membership thus automatically ended. By becoming delinquent, the member forfeits all

right to any death benefit *ipso facto* and there remains to him only the privilege, by paying the delinquent dues within six months and before he is dropped from the rolls, of reinstating himself in good standing in the Order." \* \* \* \*

A death benefit goes along with membership and increases in value in relation to the continuing of the membership.

"Thus it appears that a member pays dues to secure membership and the occupational, social and fraternal benefits that go with such membership and are inseparable from it. The death benefit is a thing apart for which the member directly pays nothing, but it is in the nature of a reward for prompt payment of dues and long continued nondelinquent membership, or in other words, long continued membership in good standing." \* \* \* \*

"Delinquency had occurred from time to time during this membership, and always within the six months period Bunge paid the sums so delinquent and resumed his membership in good standing. These prior delinquencies are mentioned only because it is argued that they show a course of dealing long continued. That may be admitted, but if we are right as to their being no waiver on the occasion of the last delinquency, then there can have been no waiver on any prior occasion. So we omit definite mention of the delinquencies which precede the one which we now consider the vital delinquency.

"The dues payable July 1, 1931, amounting to the sum of four dollars, which were required to be paid before the end of that month in order to maintain Mr. Bunge's membership in good standing and his interest in the death benefit certificate, were not paid in July, nor at all, until the



17th day of August, 1931. Consequently, upon the first day of August, 1931, he was a delinquent member and had his death then occurred his beneficiary would have been entitled to no death benefit. By the payment of these delinquent dues on August 17, he automatically again became a member in good standing and from that date he began anew to earn an interest in the death benefit fund; but before one full year had elapsed, and on June 21, 1932, he died, hence the refusal on the part of the respondent to pay any death benefit.

“When once the several by-laws varying upon this question are considered, with sufficient care to understand the meaning of the whole, as well as each and every part, it becomes self evident that such an action as this, which confesses the default, but asserts that such default was waived, cannot succeed because there has been no waiver.

“To constitute a waiver there must be an existing right and an intention to relinquish that right. 27 R. C. L. 908.

“Here, on August 1, 1931, and on each day thereafter up to August 17, while the fatal delinquency existed, the respondent had no right to forfeit Mr. Bunge’s membership in the order, because, though not in good standing, the by-laws gave him a six months period in which to cure his delinquency and regain his good standing. There was no call to give him notice that his then interest in the death benefit had been forfeited, because the contract, by which both were bound, made that forfeiture an inevitable and an irrevocable fact when the last day of July expired.

“Mr. Bunge had, under the by-laws, six months in which to save himself from final suspension and to reestablish himself so as to begin anew to earn a death benefit. His dues were four dollars per quarter, no more, no less. He must necessarily

pay four dollars to prevent final suspension and to remain a member of the order and enjoy its benefits other than the death benefit, and he was required to pay no more than that same four dollars to reenter the death benefit class and to begin again to build an interest in that fund. The respondent could not refuse to accept the four dollars paid on August 17, 1931; had, in fact, no shadow of right to refuse it, because, by doing so, it would wrongfully deny him the right to reinstatement, and therefore it relinquished nothing and waived nothing by so accepting the payment which it was obligated to accept.

“It appears that a similar case in which this respondent was a party was before the Supreme Court of Colorado, *Brotherhood of Maintenance of Way Employees v. Nolan*, 91 Colo. 181, 14 P. (2d.) 179. There, the respondent was held liable by a divided court. We, of course, know nothing of the contents of the record before the Colorado court. If the facts disclosed were only those mentioned in the majority opinion, then clearly, in that particular case, there was a waiver, but if the facts in that case were as found to be by the minority, and such as clearly appear in the record which is now before us, then there was and could be no waiver. We are bound by the record in this case. Certain language of the dissenting opinion in that case so clearly defines and elucidates the question here presented that we quote:

“‘It is clear that an insurer who, having the right to reject the payment as tendered too late, nevertheless accepts payment of an insurance premium, as such, after the time within which payment is required to be made, especially where the insurer has customarily accepted delinquent payments, waives the forfeiture that otherwise might have been enforced. \* \* \* Under the brotherhood plan the brotherhood did not have



the right to reject the payments made by Thomas Kearins and other members after the due date; it accepted the payments, as under its rules it was required to do, as membership dues, not as payment for insurance \* \* \* .

“ ‘It appears, therefore, that a member does not pay a stated amount for membership in the brotherhood and an additional amount for insurance, or death benefit, but that the amount of the membership dues is the same whether or not a death benefit is to be paid upon his decease. In other words, he pays dues for membership in a labor union and for all the privileges and advantages incident to membership in such a union; and if he remains a member for a certain prescribed period of time without any failure to pay his membership dues promptly on or before the due date, a death benefit will be paid to the person named by him. It is obvious that the provision for death benefits is intended merely as an inducement to, and a reward for long-continued, uninterrupted membership in the brotherhood and the prompt payment of membership dues. That Kearins failed to comply with the conditions necessary to entitle the plaintiff to a death benefit is admitted by her, but she pleads and relies upon a supposed waiver of such conditions. *There can be no waiver, however, where, as here, there is no freedom of choice to accept or to reject the tendered payment.* When Kearins, in November, paid his membership dues that were payable in October, the brotherhood was bound to accept the payment; it could not, if it would, have refused to accept it, or any part of it, for, though the delinquency affected the right to a death benefit in the manner explained above, Kearins still was a member of the brotherhood and as such was entitled and required to pay membership dues. The brotherhood could not drop his name from the membership roll or



refuse to accept his membership dues, unless and until his delinquency continued for six months.' ”

The Minnesota court, 1900, in *Elder v. Grand Lodge A. O. U. W. of Minnesota*, 82 N. W. 987, reversed a judgment and held in favor of the defendant. The policy provided that a failure to pay any assessment when due operated to suspend the member without any act or declaration by the lodge. The member in that case died November 24, 1896, at which time the August 1st assessment had not been paid. On several previous occasions he was in default and was then reinstated. The policy also permitted reinstatement by payment of the past assessments and an affirmative vote. The court concluded:

“In other words a compliance with the terms of a contract cannot be turned or converted into a waiver of the terms of the contract complied with. \* \* \* We are not unmindful of the fact that the law abhors forfeiture, and that the courts will perhaps enlarge and expand ordinary rules of application of evidence to defeat them. But cold facts cannot be ignored or a party relieved from the consequences of his neglect except upon some recognized principles of equity and justice.”

In Cooley's Briefs on Insurance, 2nd edition, Volume 5, Page 4400, the writer states:

“Even if there has been such a general acceptance of overdue premiums that would under ordinary circumstances establish a custom, that result cannot be predicated when the acceptance was in accordance with and expressly limited by the provisions of the contract or the rules of the insurer. Thus, if past-due premiums are accepted

under the provisions of the contract or laws relating to the reinstatement of members who have forfeited their membership by default in the payment of assessments, this does not constitute a waiver of the forfeiture. (*Jenkins v. Ancient Order of United Workmen of Kansas*, 93 Kan. 324, 144 Pac. 223.) As was said in *Elder v. Grand Lodge A. O. U. W. of Minnesota*, 79 Minn. 468, 82 N. W. 987, a compliance with the terms of the contract cannot be converted into a waiver of the terms complied with.

“So, where a member of a fraternal benefit insurance association frequently became delinquent in paying monthly assessments, and each time with a single exception his default was relieved within the time and in the manner prescribed by the by-laws, such reinstatement as provided by contract did not operate to modify it, or to estop the association from asserting rights under self-executing provisions in the by-laws for forfeiture in event of delinquency, and the member having died while delinquent there can be no recovery on any ground of modification of contract or of estoppel. *Phillips v. Fraternal Reserve Association*, 171 Wis. 143, 176 N. W. 851.”

Looking to the decision of *Jenkins v. Ancient Order of United Workmen of Kansas*, 144 Pac. 223, we find that the upper court directed a judgment for the defendant. It appears that the member had been in arrears a number of times but each time had been regularly reinstated in the Order upon payment of delinquent dues and assessments. He became delinquent for the June 1911 assessment and was reinstated as he had been before. He again became in arrears

for the July assessment and quarterly dues for August 2, 1911. Pursuant to a letter from the treasurer of the lodge advising him of his arrears and the fact that he was suspended under the by-laws, the member mailed a check which was delayed in transmission and was received by the officer of the Order nineteen days after suspension and on the same day that the member died. The by-laws provided that failure of a member to pay assessments operated as a suspension and if he died during said period his beneficiaries received nothing. Another provision was that a member may be reinstated by paying the delinquent dues and assessments and upon an affirmative vote of a local lodge. In this case the lodge had always previously voted upon his reinstatement but at the time of his death no vote had yet been taken. The court said:

“Something is made of the fact that he had been frequently suspended after he became a member and that so far as appeared he had always been reinstated by the lodge upon the payment of delinquent dues and assessments. The fact that reinstatement was never refused does not, of itself, amount to a waiver of the terms of the contract, since each reinstatement was accomplished by an affirmative vote of the lodge just as the by-laws of the order provided.  
\* \* \* Nothing in the action taken would lead a reasonable man to believe that the requirements of the contract and by-laws relating to prompt payments of dues and assessment in the future had been waived.”



In *Wiser v. Central Business Men's Assoc.*, 219 S. W. 102 (Mo. 1920), a judgment for the plaintiff was reversed in favor of the defendant. In this instance the assessment was due September 1st and was paid September 17th, while the assured's illness began September 5th. The provisions of the policy were:

"If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of the premium by the association or by any of its duly authorized agents shall reinstate the policy, but only to cover such sickness as may begin more than ten days after the date of such acceptance."

The court said:

"The mere fact that the company was in the habit of accepting premiums after they were due is not of itself sufficient to show a waiver of the default, since it may have been that such acceptance of other defaulted premiums was in accordance with the above quoted provision. Hence, the mere fact of acceptance without more would not be sufficient to base a waiver upon. \* \* \*."

"However, the instructions of the plaintiff submitted the case to the jury on the theory that a general custom or practice of defendant to receive premiums after they were due, whereby policy holders, including the plaintiff, were led to believe that payments could be made after they were due, without any forfeiture being incurred, would be sufficient to constitute a waiver. As we have hereinabove said, the mere custom of receiving premiums after they were due would not of itself create such a waiver, since under such circumstances alone the acceptance of the belated premium could be referred to a compliance with

the provision of the policy hereinabove quoted. Hence the instructions were erroneous.”

New trial was ordered for other reasons.

The Iowa Supreme Court in 1897 decided the case of *Rice v. Grand Lodge of A. O. U. W. of Iowa*, 72 N. W. 770, wherein a verdict for the plaintiff was reversed in favor of the defendant. The policy provided for suspension on nonpayment of premium and also that “if all assessments shall be paid at any time within four months, the mere fact of payment shall operate to reinstate the person suspended. If not thus reinstated within four months, the reinstatement must be by such payment, a certificate of health and a vote of the local lodge.” More than four months after the payment was due the assessment was forwarded but no health certificate was forwarded. The plaintiff alleges waiver. The opinion reads as follows:

“Among the reasons urged in support of a waiver by the order is the manner in which Wright had been permitted to pay his assessments. It does appear that he had at times paid his assessments before due \* \* \*. It also appears that he many times paid after the 28th of the month. That was his absolute right. *The lodge was bound to accept such payments and they had the effect of a reinstatement. To have denied them would have been violating the contract and the result would have been probably a reinstatement without payment.* There is absolutely nothing in such an act to show a purpose to permit or sanction an irregular course of dealing. To illustrate the argument, it is said that in

1890 Assessments 8 and 9 were paid three months after due 'and no question was raised so long as the defendant got the money.' What question could be raised? Notices were given of the assessments regularly, so far as known, and it was for Rice to pay or not, as he might elect. Whether paid before or after the 28th of the month, the lodge must accept it, within the four months and the law fixed his status. We are not told in argument what the lodge should have done in such case to avoid a waiver and it is difficult to anticipate any duty except to receive and give credit for the money."

To the same effect see *White v. Sovereign Camp, W. O. W.*, 192 S. E. 161 (S. C. 1937).

Another case which is very much in point is that of *Balogh v. Supreme Forest, Woodmen's Circle*, 280 N. W. 83 (Mich. 1938), in which the upper court affirmed a judgment *n. o. v.* for the defendant. In this case death occurred on July 20, 1935. The dues for the month of June were not paid until July 18th, at which time the deceased was in bad health. The policy provided that a "member if in good health may become reinstated by paying all arrearages and dues \* \* \* within three months from the date of suspension." The provision pertaining to suspension for non-payment was self-executing. The assured stood automatically suspended from and after the date the premiums were in default by operation of the terms of the contract. In this particular case, the member was referred to as being suspended, while in the same



or a similar situation in the case at bar the member is considered as being delinquent. The court said in its opinion:

“The practice of accepting payments after the first of the following month in no way affected the provision as to suspension. Under the express terms of the agreement, suspended members had an absolute right to reinstatement by paying the delinquency within three months from the date of suspension, provided the member was then in good health. It is therefore clear that acceptance of delinquencies in the following month was an act that the defendant was bound to perform under the very terms of the insurance contract. The member thereby became automatically reinstated, if then in good health. We fail to see how the performance of an act by the defendant’s local officers, which they were expressly bound to do, could be a waiver of anything.”

We refer to the case of *Stehlik v. Milwaukee Typographical Union No. 23*, 171 N. W. 753 (Wis. 1919). This was an action brought by a widow for the death of her husband, the action being based upon an insurance agreement between the deceased and the union. In the lower court, a judgment was rendered in favor of the plaintiff, but was reversed by the Supreme Court in favor of the defendant. As a part of the union organization, it was provided in the by-laws that upon the death of a member in good standing, the sum of \$300 would be paid. A member was in good standing only when his monthly dues for the current month were paid. It was also provided by the general

laws of the order that members of subordinate unions shall stand suspended when four months in arrears for local or international dues or assessments. As a condition for reinstatement, all past dues and assessments had to be paid, together with a reinstatement fee. It appears from reading the opinion that,

“Deceased was continually in arrears on his dues. He seldom, if ever, had them paid so as to be in good standing in the union. On one or two occasions he was more than four months in arrears and if the laws of the order had been strictly enforced by the secretary of the local union to whom he had paid his dues, he would have been automatically suspended. On such occasions, however, before it was necessary for the local secretary to make a report to the International Union, deceased paid sufficient dues to maintain his membership in the order and the local secretary did not report him as suspended. As a rule, however, the deceased was from two to three months in arrears on his dues. At the time of his death he was two months’ in arrears.”

The plaintiff contended that the defendant had waived the right to object to the payment of the \$300 benefit fund for the reason that through its course of dealing it had permitted the deceased to pay his dues in the manner above indicated. In reference to that contention the court said:

“If plaintiff’s right to recover depended upon the question of whether the deceased was a member of the order, it might be necessary to consider whether the principal just quoted is applicable in view of the fact that the local sec-

retary by his conduct on the few occasions waived those provisions of the constitution and by-laws of the order which automatically operated to suspend him as a member thereof. However, this membership in the order is not sufficient to entitle his legal representative to this benefit fund. It is plainly provided that said benefit fund shall be paid to the legal heirs of those who at the time of death were in good standing and we are referred to no conduct on the part of the defendant, or any of its officers, which in any way estopped it to deny that deceased was in good standing. The defendant and its officers were under obligation to accept the payment of his dues at the times they were tendered. The deceased had a right to be in arrears on his dues as he saw fit. In other words, he had a right to perpetuate his membership in the order by making payment of his dues in time to prevent his automatic suspension and the defendant could not refuse to accept the dues at such times."

To the same effect is *Sovereign Camp W. O. W. v. Hart*, 200 S. E. 296, (Ga. 1938.)

A very similar case to the one at bar and a case which has been referred to in Cooley's Briefs on Insurance is *Phillips v. Fraternal Reserve Association*, 176 N. W. 851. In that case the member of the fraternal order was given a period of sixty days within which to reinstate himself, the provisions being very similar to the one involved in the case at bar with the exception of time. It appears that the plaintiff had made late payments on many occasions, all of which were noted in the opinion but regardless of this fact



the court dismissed the case. We quote from that opinion as found on Page 853 as follows:

“The difficulty with the position of the plaintiff is that with the single exception of assessment No. 142 each default was relieved within the time and in the manner prescribed by the by-laws. How can it be said that reinstatement in the manner prescribed by the contract operates to modify the contract or to estop the defendant from asserting its rights under the clauses of the contract. The forfeiture clause being a self-executing provision, the contract must be given in full effect; that is, the member is suspended when the default occurs, and the policy is not in force until the member is reinstated in the manner prescribed by the by-laws. The insured died before reinstatement was attempted. At the time of his death, by reason of his default the policy was not in force, and the defendant, therefore, not liable. The insured was an able lawyer and had had a large experience in insurance matters and must have understood and appreciated the legal consequences of his acts. If he did not, although the result is harsh, we cannot rewrite his contract so as to create a liability where none existed.

“If the insured had attempted to reinstate himself in the customary manner, a difficult situation would exist. There is nothing to indicate that the defendant or the insured ever regarded the contract as in force during the period between default and reinstatement. No action on the part of an officer of the local organization, or of the defendant company, was necessary under the terms of the policy to create a forfeiture. *Hence it was immaterial whether the insured was reported delinquent or not. If a default existed, the forfeiture occurred.*”

In the case at bar there is no evidence which indicates that the appellant and deceased ever regarded the contract as in force during the period of default and reinstatement. See also *Hope v. Travellers Protective Association of America*, 126 S. E. 45; (S. C. 1925).

In the case at bar the same question might very appropriately be asked, What question could be raised and what else could the appellant have required of the member? It was only at the end of the 30-day period following default that he could have been suspended, and 30 days *had not expired* at the time of his death. The company was bound to receive any dues which he might have tendered. It is clear, therefore, that the mere receipt in the past of the dues and assessments after the first day of the month upon which they should have been paid is not a waiver of any right of the organization, for the constitution gives that member the right to pay his dues at any time within the 30 days. The deceased member, and the appellant, entered into a mutual contract wherein it was stated the conditions under which the appellant would accept a renewal of the policy and the conditions were accepted by the deceased member. There is nothing that the order has done or said to lead the insured in this case to believe that he would be reinstated and his policy revived upon any other con-

ditions than those mentioned in the delinquency clause of the policy.

4. *Payment Presumed to be In Accordance With Contractual Provisions.*

It is the contention of the appellant that where dues and assessments are paid and accepted, and there is a provision in the contract authorizing that acceptance, it must be presumed that they were paid and accepted in accordance with the provisions. There are many cases decided to this effect, and sustains the appellant's contention. The Louisiana court in 1922, in deciding the case of *Taylor v. Latin-American Life and Cas. Ins. Co.* 94 So. 375, held in favor of the defendant. Therein the policy provided that it might be revived after delinquency by the payment of all arrears, but only to cover diseases or injuries occurring after twenty-eight days following the time of revival. The insured paid a premium on February 28th, which was due February 21st. The insured died within the specified twenty-eight days following the time of revival. Plaintiff claims an estoppel because on other occasions the company had accepted late dues. The court in deciding the case said:

"We think, however, that the payments must be deemed to have been made and accepted under those provisions of the policy relating to reinstatement. By accepting them the defendant did not give the insured to understand that the twenty-eight day period was waived. In the absence of



anything to the contrary the insured was justified only in believing that the payments were accepted under the terms of the policy which fixed the effect of receiving them."

In the case at bar there was no evidence to show the insured was justified in believing that the premiums were accepted under any other than the terms of the contract.

On this same subject the Missouri court has held:

"The mere fact that the company was in the habit of accepting premiums after they were due is not of itself sufficient to show a waiver of the default, since it may have been that such acceptance of other defaulted premiums was in accordance with the above quoted provision. Hence the mere fact of acceptance, without more, would not be sufficient to base a waiver upon." *Wiser v. Central Business Men's Ass'n*. 219 S.W. 102.

5. *Failure to "Suspend" Did Not Waive the Forfeiture by Reason of Delinquency.*

The appellee will contend that the appellant waived its right to the forfeiture provisions of the contract because the local secretary, Mr. Dunn, had failed to "suspend" the deceased, on those occasions when his dues and assessments were more than 30 days delinquent, as provided in Article II, Section 8 of the 1937 Constitution and By-Laws (Def. Ex. B-6). In fact most of her argument made in this case has been devoted to that subject. Such an argument loses sight of the actual provisions of the contract. To interpret the provisions regarding "suspension" the whole of it

must be read and considered. After stating that a member shall be suspended should he "fail to restore himself to good standing within 30 days from the date of such delinquency" by the local secretary, but that "*failure to suspend*" a delinquent member under the provisions of this Section shall not constitute nor be deemed a waiver of the forfeiture provided for \* \* \* ."

In addition to the above provision, the 1937 Constitution and By-Laws in Article IV, Section 13, (Def. Ex. B-6) also provides that "No Grand or Local Council, officer, member or agent of any Local, Grand, or Supreme Council of the Order is authorized or permitted to waive any of the provisions of the Constitution of this Order, relating to insurance, as the same are now in force or may be thereafter enacted."

The failure to suspend cannot constitute a waiver of the Appellant's rights of forfeiture because, first, the *contract specifically provides it shall not do so*, and secondly, the provision regarding suspension could not possibly have been effective on the date of the assured's death regardless of whether it had or had not been previously waived. *In point of time, the provision could not become effective until August 1, 1938, some 18 days after Campbell's death.*

We refer the court to two cases in which the appellant in the case at bar was one of the parties in each of those actions. Each of them discuss the very issue before the court in this appeal, and in both cases the same contract is being considered. We refer first to *Order of United Commercial Travelers of America v. Belue*, 263 F. 502, (4th Circuit).

The writer of the opinion clearly described the formation of the governing body and local council and refers to the rights, privileges and duties of the members and the various councils. In April 1912 Belue joined the local council, became an insured member and received his certificate. A new certificate was issued to him in 1914 for reasons not material. He died April 24, 1917 from an accidental wound. The company denied liability on the ground that at the time the assured received the injury he was not in good standing. The facts are that for a year or more after he received the insurance certificate he paid his dues with reasonable promptness. In 1916, however, he was suspended for failure to pay insurance dues and assessment and was later reinstated when he paid the amounts for which he was then in arrears. He was reinstated on August 12, 1916. No payment was made by him after that date. On April 19, 1917 he sustained an injury which resulted in his death a few days later. The secretary had sent him several



statements regarding his delinquent dues and assessment and, on April 20, the secretary again wrote him after which time Belue's father took a check to the office of the Order, which check was accepted and deposited in the bank without knowledge on the part of the secretary that Belue had received an injury. The opinion of the court reads as follows:

"The case comes at once to a question of a waiver. Plaintiff contends that the acceptance of the father's check by Reid, the local secretary, though in ignorance of Belue's illness, or of any claim that he had suffered an accident, operated nevertheless to restore the insured to 'good standing' in all respects and to give him the status of a member who had not been delinquent. We are unable to sustain this contention. The certificate issued to Belue, reproducing a provision of the constitution authorized by the laws of Ohio and of South Carolina, contains the unqualified statement that, "no officer, member or agent of any Subordinate, Grand or the Supreme Council of this Order is authorized or permitted to waive any of the provisions of the constitution of this Order relating to insurance as the same are now in force or may be hereafter enacted.' And the constitution provides in most explicit terms, repeated in the certificate, that if any insured member fails to pay his dues and assessments as and when they become payable, 'he shall immediately, on the happening of such default and by virtue thereof' cease to be in good standing and be suspended from all benefits and rights to indemnity, and that if such delinquent should at any time regain his good standing as an insured member 'his restoration thereto shall in nowise operate to entitle him or any one claiming by, through or under him, or his membership or his

certificate of insurance, to indemnity or benefits on account of any accident or injury received by him while not in good standing, or on account of death resulting therefrom.'

"The facts established at the trial permit no doubt of the full application of these provisions. It is virtually conceded" and surely cannot be denied that the cause of Belue's illness and death, whatever it was, antedated by some days at least the payment made by his father. When that payment was unwittingly accepted, Belue had been in default for several months and by virtue thereof had forfeited all rights to indemnity under the insurance contract. True, he had not been formally 'suspended,' apparently because the local council had neglected its duty and so, for argument sake, it may be assumed that Reid's acceptance of the check on the 21st of April operated to reinstate Belue in good standing as an insured member from and after that date. By no valid process of reasoning can the transaction be given any greater effect. That it was not and could not be retroactive to the extent of creating liability for an accident which happened during the period of delinquency, seems too plain for serious question."

"The whole argument of plaintiff is conclusively answered, as we think, by the fact that Belue was not insured at the time that he is alleged to have received an injury, because he was then in arrears of long standing, and that no after payment to the local secretary or even to the Supreme Council itself could revive his insurance as against an accident occurring in the meantime. Not only does the contract expressly so declare, but it also declares in clearest terms that no officer or agent of the Order shall have authority or be permitted to waive its provisions. In our judgment the local secretary, whether acting in that capacity or merely as a collecting



agent for the Supreme Council was wholly without power by anything he did or could do to relieve Belue from the consequences of his default or to estop the defendant from denying liability because of that default. To hold otherwise would be to set at naught the basic provisions of the constitution and to imperil the stability and usefulness of the Order by making it responsible in such circumstances as are here disclosed for the mistakes and negligence and even the bad faith of local officials. The claim of waiver must be rejected."

"This conclusion appears to be supported by practically unanimous authority. Indeed the decisions are so little in conflict that quotations would hardly be appropriate. (Citing cases)."

Another case clearly in point, decided by the South Carolina court in 1917, is *Sternheimer v. Order of the United Commercial Travelers of America*, 93 S. E. 8. Judgment was entered in the lower court in favor of the defendant upon its motion for a directed verdict. The supreme court affirmed the order. The opinion reads as follows:

"On January 22, 1910, Hiram C. Sternheimer became a member of the defendant fraternal benefit association and a certificate of membership was issued to him. \* \* \* Insured was accidentally killed September 12, 1912. Defendant refused payment on the ground that he was not in good standing at the time of his death. The Constitution and By-Laws of the Order provide that any member who fails to pay his dues and assessments 'when and as the same become due and payable' shall immediately become a delinquent member and the right to indemnity and benefits is thereby forfeited during his delinquency; upon



payment of arrearages he is *ipso facto* restored to good standing but only for indemnity and benefits thereafter accruing; that delinquent members shall be suspended at the next regular meeting of the subordinate Council to which they belong, and, in default of such meeting by the Secretary-Treasurer thereof, and notice thereof shall be given to the Supreme Secretary; but neither the failure to suspend a delinquent member nor the giving of notice of dues and assessments to delinquent or suspended members shall be a waiver of the forfeiture incurred. The difference between delinquency and suspension is that a delinquent member may restore himself to good standing simply by paying his arrearages but a suspended member is required to file a new application, and pay all arrearages and certain fines, and be restored, if at all, by vote of the Council in which three adverse ballots are sufficient to reject the application. The first question is one of practice. Plaintiff alleged, *inter alia*, that insured was in good standing at the time of his death. Defendant's answer did not deny any allegations of the complaint but set up delinquencies of the insured at the time of his death, as an affirmative defense, alleging that he was in arrears for dues and assessments at the time of his death. \* \* \*

"After hearing all the evidence offered by both parties the court directed a verdict for defendant. To this plaintiff excepts on the ground that the evidence warranted a reasonable finding, first, that insured was not delinquent at the time of his death; and second, of waiver.

"\* \* \* The dues were \$5.00 a year due and payable \$2.50 January 1st and \$2.50 July 1st. The amount of dues and dates of payment thereof were fixed by a by-law but it was the custom of the Council to allow an extension of thirty days for the payment of dues as they belonged

exclusively to the local Council. *It was also the custom of the Council to allow delinquent members to pass the time when they should have been suspended without suspending them; but of this custom neither the Supreme Council nor any of its officers had any notice."*

It appeared from the evidence that at the time of the death of Sternheimer he had not paid the dues payable July 1, 1912, nor had he paid assessments No. 111 and 112 which were payable on or before June 15th and August 14th, 1912, and at the time of his death the total arrearages were \$6.50 which was made up of \$2.50 for dues payable July 1st and \$4.00 for those two assessments which were due June 15th and August 14th. The evidence further showed that on August 18th the deceased sent a letter to the local secretary inquiring as to how much he owed. That letter was answered on August 24th according to the secretary's records in which he advised that there was \$6.50 for dues and assessments. On August 26th a circular was sent to Sternheimer in which his attention was again called to the fact that he was delinquent \$6.50. After the assured's death there was found in his personal papers the circular letter of August 26th and the assessment card for Assessments 111 and 112. The testimony of the plaintiff was that she did not find among the letters of the deceased that one dated August 24th written by the secretary.

In deciding the case, the court said:

“The burden of proving waiver was on plaintiff. *Copeland v. Insurance Co.*, 43 South Carolina 26, 20 S. E. 754. The facts relied upon as evidence of waiver have already been stated, to-wit, custom of the local Council and its officers of allowing members to pass the period of suspension without payment of dues and assessments without suspending them and notifying the Supreme Secretary thereof. There are two reasons why this cannot be held to show waiver:

“(1) *The Constitution and By-Laws of the Order expressly provide that it shall not constitute waiver. That was a part of the contract agreed to by the insured and binding upon him and his beneficiary. \* \* \**

“(2) *There was no evidence tending to show that the Supreme Council or any of its officers had notice of the custom. \* \* \** In this case the Secretary-Treasurer refused to accept them. Clearly, therefore, there was in this case no waiver by the conduct of the Secretary-Treasurer in accepting payment of arrearages to hold that the failure of that officer or of the local Council to suspend delinquent members was a waiver would be to abrogate the Constitution and By-Laws of the Order and the statutes of this state.”

The contract in the case at bar not only stipulated that the failure of the local secretary to suspend a member would not be deemed a waiver of the forfeiture provisions, but in addition it specifically provided, as previously stated, the local council or any of its officers shall not have the power to waive any provisions relating to insurance. In view of these two provisions it is not possible for the appellee to establish waiver and estoppel by proving some action or failure of action



by the local council or its officers as required by the constitution and By-Laws.

Both the Supreme Court of the United States, and the circuit court of appeals for the eighth circuit have held fraternal organizations may limit the power or ability of the local councils or its officers to waive any provisions of its contracts, and that the parties to such a contract are presumed to know its terms and are bound thereby.

The opinion of the Supreme Court in the case of *Northern Assurance Co. v. Grand View Bldg. Assn.*, 182 U. S. 308, 22 Sup. Ct. 123, 46 L. Ed. 313, is as follows:

“. . . policy holders of insurance companies must, at their peril, take notice of limitations upon the powers of local soliciting agents, of which they are advised by provisions contained in their policies, . . .”

The other case above referred to is that of *Modern Woodmen of America v. Tevis*, 117 Fed. 369 wherein Judge Sanborn said:

“A principal may limit the authority of his agent and when he does so the agent cannot bind his principal beyond the limits of his authority by contract, estoppel, or waiver, to those who know the limitation of his power. Insurance companies and beneficial associations may limit the authority of their agents in this way by stipulations in their contracts, and, when so limited, such agents cannot by contract, waiver, or

estoppel bind their companies to the insured or to the beneficiaries of the agreements beyond the scope of their authority prescribed therein, because the insured and the beneficiaries are conclusively presumed, in the absence of fraud or mistake, to know the terms of their contracts. The Modern Woodmen of America so limited the power of the clerk of the local camp by the terms of its benefit certificate in this case that he was without authority to extend the time of payment of benefit assessments, to waive defaults in their payment, or to reinstate a delinquent member who was not in good health, or who failed to furnish a warranty thereof. The beneficiaries and the insured knew these limitations upon the power of this agent, because they were a part of their contract with the society; and the acts of this local clerk beyond the scope of his prescribed authority, in the absence of notice or knowledge of and acquiescence in them by some of the principal officers of the society, constituted no waiver, estoppel, or contract of the association. They were not the acts of the society, and the insured and the beneficiaries were charged with knowledge of that fact . . . .”

In the Tevis case the question was whether the member was in good standing when he died. A local lodge custom of collecting assessments late were the facts depended on to establish waiver and estoppel. The local lodge had set up a safety fund, from which the clerk was authorized to draw to pay one assessment for delinquent members. The report of the local clerk was required to be sent the head lodge on the 20th of the month following the due date. Instead of suspending members who were delinquent on the

first of the month and reinstating those who had paid before the 20th, a custom grew up to accept dues and assessments any time before the report was sent to the head lodge. The June assessment had not been paid, but this was paid for him out of the safety fund. He was not reported as being either delinquent or suspended. The July assessment was delinquent *ipso facto* August 1st. Before the report was sent to the head lodge, and on August 10th, the member died. The beneficiary contended that on account of the safety fund of the local lodge that the insured died in good standing, and that the society was estopped from forfeiting the certificate.

6. *The Burden is Upon the Plaintiff to Establish Waiver.*

It was said in the case of *Fink v. Catholic Order of Foresters*, 200 N. W., 809, (Minn., 1924) as follows:

“To show a waiver the burden is upon those asserting it. *Bratley v. Brotherhood of American Yeomen*, 198 N. W. 128; *Louden v. Modern Brotherhood of America*, 107 Minn. 12, 119 N. W., 425, and *Elder v. Grand Lodge A. O. U. W.*, 79 Minn. 468, 82 N. W., 987.”

## CONCLUSION

The trial court submitted this case to the jury on the sole question of waiver and estoppel. The court allowed the jury to say that the appellant waived some right by reason of its contract in accepting



premiums from the deceased after they had become delinquent. The court allowed the jury to further say that, by reason of such an act, the appellant was estopped from denying liability upon the certificate. Diligent search of the record reveals no evidence upon which a finding could be made that the appellant did anything, or pursued any course of conduct, inconsistent with the provisions of the contract here in question. We repeat, that the deceased had the right to pay his premiums after they had become delinquent and the appellant was bound to accept such premiums.

The provisions of the contract giving the insured the right to tender late payment of premiums did not limit the number of times that this right might be exercised by him. He might be late in every payment made and the appellant would be bound to accept his late payments. Obviously, the doctrine of waiver and estoppel cannot be applied where the parties were merely fulfilling their obligations under a contract, or exercising the rights which they had by virtue of said contract.

The question of suspension of the insured in this case cannot possibly be material to this inquiry. At the time of his death the insured had been a delinquent member for twelve days and the right to invoke the suspension provision would not arise until the expiration of another eighteen days following his death.

We submit, therefore, that the judgment of the trial court should be reversed, with instructions to dismiss the action.

Respectfully submitted:

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN





IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
For the Ninth Circuit 6

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THE ORDER OF UNITED COMMERCIAL TRAVELERS OF  
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*Appellant,*

vs.

ESTELLE CAMPBELL,

*Appellee.*

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UPON APPEAL FROM THE UNITED STATES DISTRICT  
COURT, FOR THE WESTERN DISTRICT OF WASH-  
INGTON, NORTHERN DIVISION

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HON. CHARLES D. CAVANAH, *District Judge*

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BRIEF FOR APPELLEE, ESTELLE CAMPBELL

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IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
For the Ninth Circuit

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THE ORDER OF UNITED COMMERCIAL TRAVELERS OF  
AMERICA,

*Appellant,*

vs.

ESTELLE CAMPBELL,

*Appellee.*

---

UPON APPEAL FROM THE UNITED STATES DISTRICT  
COURT, FOR THE WESTERN DISTRICT OF WASH-  
INGTON, NORTHERN DIVISION

---

HON. CHARLES D. CAVANAH, *District Judge*

---

BRIEF FOR APPELLEE, ESTELLE CAMPBELL

STATEMENT OF THE CASE

This brief is submitted on behalf of the appellee,  
Estelle Campbell.

Appellant's statement of the case is controverted  
as being incomplete and we, therefore, here set out  
a statement of the case.

This is an action brought by a beneficiary under  
a certificate of insurance issued by the appellant,  
a fraternal benefit association, on January 3, 1920.  
Pursuant to the provisions of 28 USCA, Sections 41



and 71, the action was removed to the United States District Court for the Western District of Washington, Northern Division, on the grounds that it involved over \$3,000.00 and that there was a diversity of citizenship. The cause was tried before the court and a jury on January 19, 1940. There was verdict for the plaintiff, and, on the same day, the clerk entered judgment thereon. Formal judgment was signed on January 26, 1940, and filed January 29, 1940. Appellant's motions for judgment notwithstanding the verdict and for a new trial were denied by an order entered March 18, 1940.

On April 16, 1940, notice of appeal was filed with the clerk's office and on April 20, 1940, a supersedeas and cost bond on appeal was filed.

Appellant, an Ohio corporation, is authorized to do business in the State of Washington. Its Supreme Council governs the organization and its many Grand and Local Councils throughout the country. The decedent-insured, Robert H. Campbell, was a member of Seattle Local Council No. 83. The rights, privileges, powers and duties of the three types of councils and of all individual members are governed by a constitution and by-laws printed in pamphlet form and frequently amended. So far as the facts of this case are concerned, they are controlled by the constitution and by-laws, effective September 1, 1919, consisting of a pamphlet of over 100 pages of some forty closely printed lines, and by

the constitution and by-laws effective September 1, 1937, consisting of a pamphlet of 100 pages of some forty closely printed lines. Both of these pamphlets were admitted in evidence (R. 68, 81) and their pertinent portions are printed in the transcript of record (R. 45-51, 60-66).

Through error and accident there was omitted from the record, as printed for the consideration of this Court, a section of the 1937 constitution of the Order material to the appellant's case, and two sections of the 1919 constitution of the Order material to the appellee's case. These sections, as parts of the constitutions, were before the trial court and jury. The parties to this appeal, through their counsel, have prepared and signed a stipulation directing that the omissions be corrected and a supplemental record containing the omitted sections be certified and transmitted by the clerk of the district court to this Court. It is the desire of both parties that the omitted portions of the record be considered on this appeal.

For the convenience of the Court and the parties the omitted sections have been printed in an appendix to this brief.

When the decedent became an insured member on January 3, 1920, \$2.00 "calls" were levied by the Supreme Secretary against the individual insured member's account with the local council. No such call could be levied against a new member within



the two calendar months succeeding that in which he was insured. The \$2.00 had to be paid to the Supreme Secretary by the local council within 15 days of the call. (R. 46) Within 15 days of the call the Supreme Secretary also levied an assessment on each insured member in good standing, which assessment was paid to the secretary-treasurer of the subordinate or local council within 30 days of the date of levy. No new member could be assessed for any such purpose within the two calendar months succeeding that within which he was insured. (R. 46).

The 1919 constitution also provided that any member, insured or uninsured, failing to pay all dues and assessments charged or levied against him as a member or an insured member when and as they became due and payable, immediately became delinquent, was suspended from all benefits and ceased to be in good standing as a member of the Order. If he later regained his good standing as a member or was reinstated as an insured member his restoration did not entitle him or his beneficiary to indemnity or benefits on account of any accident or injury received by him while not in good standing or on account of death resulting therefrom. (R. 47, Appendix, 1 et seq.)

Under the 1919 constitution any members, insured or uninsured, failing to pay arrearages before the next regular meeting of his subordinate council



(held once every 30 days—R. 51) following his default, was to be suspended from the Order by the senior counselor or the presiding officer of the local council. If such meeting, for any reason, was not held, the secretary-treasurer of the council was ordered to suspend the member from the Order, entering that fact on his books. If such officer failed to suspend the delinquent member, he, the officer, was subject to summary removal from office by the Supreme Counselor. (R. 47, Appendix, 1 et seq.)

Upon suspension from membership the member's certificate of insurance was deemed cancelled, null and void, without the necessity of formal cancellation (R. 48). One witness testified that suspensions for failure to pay dues and assessments when due were made in Columbus, Ohio, at the headquarters of the Supreme Council (R. 69).

Reinstatement of all members suspended from the Order was effected by making application therefor to their local council, on a blank prepared by the supreme executive committee of the Order. The application was to be accompanied by a sum equal to the current dues and one assessment. The secretary-treasurer of the local council presented the application at the next regular meeting of the council. It then had to be referred to a committee of 3 for investigation and the committee's report was subject to a ball ballot. If no more than 2 voted against

reinstatement, the member was reinstated by the senior counselor. (Appendix, 1 et seq.)

The 1919 constitution further provided that, after the automatic cancellation referred to in the preceding paragraph of this statement of facts, the insured member should reapply for insurance on a blank prepared by the Supreme Executive Committee, and should accompany the application with \$2.00. The application was forwarded to the Supreme Secretary. The Supreme Executive Committee could require the applicant's examination by his Council Surgeon, the Supreme Surgeon or some competent person selected by the Supreme Surgeon. The report was submitted to the Committee, and if the applicant was found a desirable risk the Committee could insure the member.

It appears from the testimony of the Secretary-Treasurer of the local council, George B. Dunn, that the provisions of the constitution of 1919 were changed at some period unknown to the witness so that the dues and assessments had to be paid at the end of the call and the members did not have thirty days within which to pay them (R. 73). No copy of the constitution making such change was offered in evidence by appellant. Nor did appellant produce any constitution of the Order other than that effective on September 1, 1937, (Defendant's Exhibit B-6; R. 60). The witness' testimony would indicate that the provisions of the 1919 constitution were in



effect for a considerable, though undetermined, length of time.

The 1937 constitution provided that there be an annual assessment of \$16.00 charged against all insured members on December 2 of each year. These could be paid annually, semi-annually or quarterly but in any event payments of \$4.00 were due and payable on or before December 31, March 31, June 30 and September 30 of each year (R. 65). This constitution also contained the provision that no newly initiated member was to be assessed for any purpose within two calendar months succeeding that within which his certificate of insurance was issued. (R. 62.)

The 1937 constitution differed from that of 1919, in that he who failed to pay his dues or assessment when due occupied a "delinquent" status for 30 days after the default. During that time he could reinstate himself merely by paying the sum due. Yet upon the default all indemnity and benefits were lost to him and his beneficiary and upon his reinstatement within the 30 days such indemnity and benefits were restored but did not operate to cover any accident or injury received by him while in default, or a death resulting from such accident or injury. During the 30 day period he was not suspended nor was his certificate cancelled. (R. 61-62.)

It was further provided that:

"Should any delinquent member fail to re-



store himself in good standing within thirty (30) days from the date of such delinquency, the Secretary-Treasurer of his Local Council shall immediately suspend him from membership and insurance in the Order. Such Secretary-Treasurer shall at once notify the Supreme Secretary of such suspension and report the same to his Local Council at its next regular meeting.

“Failure to suspend a delinquent member under the provisions of this Section shall not constitute nor be deemed a waiver of the forfeiture provided for in this Section, and the officer so failing to suspend may be summarily removed from office by the Supreme Counselor.” (R. 62-63.)

The 1937 constitution also provided that upon suspension the member's certificate of insurance was deemed cancelled, null and void, from and after such suspension without the necessity of formal record of cancellation. (R. 66.)

Under the 1937 constitution the suspended member, being under 60 years of age, as the insured was when he died, desiring reinstatement within 90 days of his suspension, might be reinstated by signing a statement prepared by the Supreme Executive Committee, that his mental and physical condition was not impaired in any way that would render him undesirable for insurance, and by paying such pro rata portion of the annual assessment as the Committee might fix and a sum equal to the dues for the current period. The Secretary-Treasurer of the local council forwarded the statement, together with the amount of one assessment to the Supreme Secre-

tary. If the application was approved by the Supreme Executive Committee, the Supreme Secretary made a record of the reinstatement and forwarded that record to the applicant showing the reinstatement. (R. 64.)

If the applicant failed to apply for reinstatement within 90 days after his suspension, the application was submitted to the Secretary-Treasurer of his local council and presented at the next regular meeting of that council. After investigation by a committee of three members, a ball ballot was taken on the application and if not more than two adverse ballots appeared, the Senior Counselor declared the applicant reinstated to membership, subject to the approval of the Supreme Executive Committee. (R. 63-64.)

The complaint alleges appellant's issuance of a certificate of insurance to Robert Henry Campbell on January 3, 1920; that all dues and assessments were paid or tendered and that the policy was in full force and effect on July 12, 1938, the date of the insured's death by accident within the meaning of the provisions of the contract (R. 1). The questions of the accidental death, appellee's notice thereof to appellant, the latter's failure to furnish proofs of claim, appellee's substitution as beneficiary, and the reduction of the death benefit from \$6,300.00 to \$5,000.00, were admitted by stipulation at the time of trial (R. 24).



Appellant, admitting the existence of the certificate of insurance, pleaded portions of it and portions of the 1937 constitution and that deceased was in default by reason of the failure to pay Assessment No. 233, which was payable June 30, 1938, thus relying upon the forfeiture provisions of the contract (R. 12).

By amended reply the appellee pleaded appellant's waiver of the forfeiture provisions of the contract and its estoppel to rely upon the forfeiture provisions, and also alleged that assessment No. 233 was paid by reason of certain credits to which the insured was entitled on the books of the appellant. (R. 19.)

Appellee introduced in evidence the certificate of insurance (R. 67), a portion of which is printed in the record (R. 41), the certificate of membership (R. 44-67), the 1919 constitution (R. 68), portions of which are printed in the record (R. 45-51), appellant's account sheets (R. 70), most of which are printed in the record (R. 52, 54), and the so-called "courtesy" delinquent notice and the envelope in which it had been mailed (R. 79), printed in the record (R. 55-56).

Appellant introduced in evidence a notice of quarterly installment No. 239, due December 31, 1939 (R. 81), printed in the record (R. 56), an extract from "The Sample Case" of installment No. 239 (R. 81), printed in the record (R. 57), extracts from



three copies of the "Seattle Tickler" (R. 81), printed in the record (R. 58-59) and the 1937 constitution (R. 81), portions of which are printed in the record (R. 60-66).

By typographical error there is omitted from the printed copy of "Plaintiff's Exhibits '4' and '5'" (R. 52) ditto marks and the numeral "1" to show that dues of \$1.00 payable October 1, 1926, were paid May 11, 1926; and the numeral "1" is omitted to show the sum of the dues paid on March 29 and October 13, 1937.

Under "When Called" in the Assessment Account is entered the date when the particular assessment is due.

The account sheets just referred to (R. 52) show that during the life of the certificate of insurance, Robert Henry Campbell, the insured, paid 144 installments of dues and assessments. These exhibits reveal that fifty-one of the installments were paid after they were due and payable. The period of default ranges from eight days for assessment No. 197 to one hundred twenty-eight days for the dues payable July 1, 1929. Some of the other periods of default are ninety-nine days, seventy-two days, three of seventy-one days, eighty-nine days, and two of fifty-five days. Twenty-seven (27) of the installments were paid more than thirty days after they were due.

It is important to remember that the account

sheets (R. 52) show that in each of the fifty-one instances where the insured failed to pay dues and assessments when they were due and payable, the appellant subsequently collected, retained and still retains the dues or assessment thus in default.

The Secretary-Treasurer of the Local Council testified that he had to make a report of payments by members and suspensions of members for non-payment of dues and assessments to the Supreme Secretary by the 15th of each month. Such report would show who had been suspended for failing to pay dues or assessments by the first of that month. Presumably when he collected the defaulted dues and assessments from the insured he included them in this report and sent them back to Columbus. There is no evidence that Columbus headquarters ever returned them to the insured or to the local council.

The evidence is uncontradicted that the insured was never formally "suspended" from membership in the Order by reason of default in the payment of dues or assessments (R. 75). If he had been "suspended" for that reason the record sheets would have been marked "Suspended" (R. 70). They were not so marked (R. 52). There was no evidence that his policy was ever formally cancelled or declared null and void. Nor was he ever required to re-apply for membership or insurance or submit to a further medical examination. Appellant introduced no evi-



dence to show that he was ever required, as a condition of reinstatement, to sign a statement, prepared by the Supreme Executive Committee, that his medical and physical condition was not impaired in any way that would render him undesirable for insurance. It does not appear that he was ever required to submit the question of his reinsurance to the Supreme Executive Committee, to a meeting of his Local Council or to the Secretary-Treasurer of his Local Council. There is no evidence that the appellant company ever did anything but accept each payment made by him whenever it was offered the money. The appellant never refused to accept any payment because the insured was "suspended" or because the certificate of insurance was cancelled, null and void. And, by its failure to tender the sum of the late payments to the insured during his life or to the appellee upon insured's death, it is apparent that appellant still maintains its right to waive any and all forfeiture provisions and yet, insist upon full payment.

## A R G U M E N T

### SUMMARY

It is the established rule in the State of Washington that the by-laws of a fraternal insurance society may be waived by a custom acquiesced in by the society. And the acts, declarations and dealings which go to make up that custom may be those of the society itself or those of its agent.



It is also the rule in this state that the custom may be the result of the acts, declarations and dealings of the collecting officer of the local camp even though the constitution of the order provides that he cannot waive the provisions of the constitution, for, of course, such a proviso may also be waived. On a strict application of theories of agency it is said that the case does not rest upon waiver by the local agent but upon the rule that where the local officer knows of facts which render the policy null and void, his custom of collecting and retaining assessments and dues and in transmitting them to the home office is the act of the home office, for his knowledge is the knowledge of the society.

By the provisions of both the 1919 and the 1937 constitutions the society had established a custom of receiving payments of dues and assessments from the insured from 1 to 128 days after they were due. The society failed to put into effect the penalty provisions contained in those constitutions. The insured was not formally suspended and his policy was never treated as cancelled, null and void. The society continued to demand and accept late payments, which, upon receipt by the local collecting officer, were transmitted to and retained by the home office.

Under the 1919 constitution the insured member was automatically suspended from benefits on the day of default. If he failed to pay the arrearages

by the time of the next meeting of the local council he was suspended from membership by the Senior Counselor of the local council or by its Secretary-Treasurer. This suspension had to take place within 30 days of default, because the meetings were held every 30 days. Suspension from membership amounted to automatic cancellation of the policy. Reinstatement was formal and involved (R. 47-48, 50-51, appendix, 1 *et seq.*) Under the 1937 constitution the delinquency and suspension provisions were included in one section which set out the provisions of forfeiture. The existence of a waiver depends upon the effect the insurer's actions have upon the insured, not upon what the insurer intends. The insurer did waive the suspension provisions and did accept subsequent payments of dues and assessments. The jury had before it the uncontradicted fact that from one-fifth to one-third of all the payments insured made, were made at a time when, had the insurance company put into effect the forfeiture provisions of the contract, the certificate was cancelled, null and void. What would this lead a reasonably prudent man to believe? The notice sent to the home of the insured on July 6, 1938, was also before the jury, and it is further evidence that the company did not put into effect the delinquency or non-coverage provisions of the constitution, for it provided that payment of assessment No. 233 had to be made at once, "*or you can-*



not receive any benefits in case of accident” (R. 55, emphasis supplied). The jury found that a reasonably prudent man would thereby be led to believe that his policy continued in force even during default periods. This is a justifiable inference supported by the evidence, and this has so been held in a case involving this appellant. *Suits v. Order of United Commercial Travelers*, 166 N. W. 222 (Minn. 1918). To reach a different conclusion requires a finding under the 1937 constitution, that the insured realized he was not covered during the 30-day delinquent period but was justified in believing that for periods of default of more than 30 days the company had waived its suspension and non-coverage provisions. This is unreasonable. Furthermore the jury could as well reach the conclusion it did.

Once the custom of permitting the insured to make late payments without putting into effect the forfeiture provisions of the contract is established, there is a presumption that the insured acts in reliance upon it when he fails to pay dues or assessments within the period.

It being established that the custom may amount to a waiver, and that the agent of the Supreme Council may waive the constitutional provisions or that his knowledge and acts are those of the Supreme Council, it was proper for the Secretary-Treasurer of the appellant's Local Council to testify as to what he had or had not done. Appellant's



objection to his so testifying was not well taken since he later testified for the appellant on the same questions without any reservation of objections by appellant's council. Furthermore the objection to Mr. Dunn's testimony was taken at a time when he was testifying as to the content of plaintiff's exhibits Nos. 4 and 5 which had been admitted without objection by appellant (R. 70). And finally the objection taken was too general in its reference to the "provisions of the contract itself" to permit the appellant to raise the question on appeal. The contention of appellant is that the 1937 constitution was "the part of the contract." At the time the objection was taken this constitution had not been offered in evidence.

Once a custom amounting to a waiver or estoppel has been established it can be nullified and a forfeiture declared for the same cause only upon *specific notice* to the insured that the penalty provisions will be insisted upon. The only pertinent evidence of notice being given to this insured was contained in publications which had been sent to him during the same time that the company was pursuing the course of conduct which resulted in the waiver. Such notice, unofficial as it was, sent to every individual member will not be deemed of more force than the actual official provisions of the constitution which the company is waiving at the same time it gives the unofficial notice.

The notice contained in plaintiff's exhibits Nos. 6 and 7 (R. 79) were never received by the insured, and could not be specific notice to him. Furthermore it furnishes additional evidence upon which the jury could find a waiver or estoppel because it asked for payment of assessment No. 233 at once "or you cannot receive any benefits in case of accident" (R. 55, emphasis supplied).

The denial of appellant's motion for dismissal and the refusal to direct a verdict for it were proper because of the law governing the facts of this case. Both the law and the facts are to be fully discussed in the main body of this brief.

Appellant's specification of errors, Nos. III, IV, and V (Appellant's Brief, 11-14) cannot be urged on appeal because they were not made until after the jury had retired to consider the verdict, and appellant's counsel did not ask that the jury be recalled and proper instructions given.

The specification that the court erred in giving the portion of the instruction set out in appellant's brief on pages 11 and 12, must be considered as a part of the entire instruction by the court (R. 91-96). That instruction correctly stated the law governing this case.

Appellant's contention that the court erred in refusing to give its requested instruction No. 4 is not well taken (R. 13). Its content, stated in the negative, is contained in the instructions the court did



give. The same objection may be made to appellant's contention that the court erred in failing to give its requested instruction No. 5 (R. 13-14).

### POINT ONE

THE BY-LAWS OF A FRATERNAL BENEFIT INSURANCE SOCIETY DECLARING A FORFEITURE OF BENEFITS FOR NON-PAYMENT OF DUES OR ASSESSMENTS WHEN DUE MAY BE WAIVED BY A CUSTOM ACQUIESCED IN BY THE SOCIETY, AND THIS IS SO WHETHER THE CUSTOM IS THE RESULT OF THE ACTS AND REPRESENTATIONS OF THE SOCIETY ITSELF OR OF ITS LOCAL COLLECTING OFFICER.

### THE GENERAL RULE.

Appellant has specified six errors in its brief and has divided its argument into six subheads. Yet, the appellant's case really rests upon two contentions. Firstly, the last assessment was not paid when due; by the terms of the contract between the parties, the insured was delinquent and neither he nor the beneficiary was entitled to benefits under the policy; and, the appellant had not so conducted itself with relation to the insured as to create a waiver of the delinquency provisions of the contract or an estoppel to rely upon such provisions. Secondly, the secretary-treasurer of the local council did nothing which would bind the Supreme Council by waiver or estoppel because no known right was waived and because it was specifically provided in the constitution that he could not waive



any of its provisions.

The determination of the questions raised by these contentions must depend upon the law of the State of Washington since they are questions of substantive law and general jurisprudence.

*Erie Railroad Company v. Thompkins*, 304 U. S. 64, 78; 82 L. ed. 1188, 1194; 58 S. Ct. 817.

The rule is firmly established in this state that a fraternal benefit society, such as the appellant, may by custom, waive the provisions of its by-laws.

In *Kennedy v. Knights of Maccabees*, 100 Wash. 36, 170 Pac. 371, the local record keeper had for years accepted the dues of members up to the 20th of the month following the month for which they were due and payable. No record of suspension for defaults in a prior month was made until such report was sent in to the supreme tent on or about the 20th, although the constitution provided that suspension was to be made on default. It was also *the custom* of the record keeper, before sending in the report of suspensions, to send a notice to the member that his dues were unpaid, and that, unless they were paid by the 20th, he would be reported as suspended. The plaintiff relied upon waiver of the forfeiture provisions by custom. There was a motion to strike the portions of the complaint showing custom and tending to fortify the showing of custom by the statement of interrelated facts. There was also a demurrer on the ground of the insufficiency of the facts to state his cause of action.

Both the motion and the demurrer were overruled and there was judgment on the verdict for plaintiff. This judgment was affirmed on appeal. In passing on the question of the existence of a rule of waiver by custom the court said:

“We think the motion and demurrer were both properly overruled. It is the rule in this state that the by-laws of a fraternal insurance society may be waived by a custom acquiesced in by the society. *Richardson v. Brotherhood of Locomotive Firemen & Enginemen*, 70 Wash. 76, 126 Pac. 82, 41 L. R. A. (N. S.) 320; *Frank v. Switchmen’s Union of North America*, 87 Wash. 634, 152 Pac. 512; *Morgan v. Northwestern Nat. Life Ins. Co.*, 42 Wash. 10, 84 Pac. 412, 7 Ann. Cas. 382; *Boutin v. National Casualty Co.*, 86 Wash. 372, 150 Pac. 449.” 100 Wash. 39, 170 Pac. 372.

The rule is well stated in *Reynolds v. Travelers Insurance Co.*, 176 Wash. 36, 28 P. (2d) 310. That case involved waiver by a local agent after the forfeiture upon which the company could have relied, rather than a waiver by custom as in this case. Nevertheless the court in its opinion stated the rule which applies, as well, to the facts of the instant case. At page 26 of its brief appellant has quoted from the case as authority for its contention that there must be a waiver of a known right. The complete quotation is as follows:

“A waiver is the voluntary relinquishment of a known right, and may be either express or implied. An express waiver is governed by its own terms, and hence is not often the subject of much dispute. An implied waiver may arise



where one party has pursued such a course of conduct as to evidence an intention to waive a right, or where his conduct is inconsistent with any other intention than to waive it. An estoppel is a preclusion by act or conduct from asserting a right which might otherwise have existed, to the detriment and prejudice of another who, in reliance on such act or conduct, has acted upon it. A waiver is unilateral and arises by the intentional relinquishment of a right, or by a neglect to insist upon it, while an estoppel presupposes some conduct or dealing with another by which the other is induced to act, or to forbear to act. 5 Cooley's Briefs on Insurance (2d Ed.), pp. 3939 to 3945.

"In this case, there is no evidence of any express waiver, although respondent contends to the contrary. This leaves the question, then, whether there was an implied waiver or else an estoppel. Just where the application of the doctrine of implied waiver ends and where that of estoppel begins, is often a very difficult question, and the authorities indicate much confusion upon the subject. It is not necessary to attempt to draw the distinction here, because we are satisfied that, under the facts as shown by the evidence, there were both an implied waiver and an estoppel.

"The rule upon the subject is that, if an insurance company, having knowledge of such facts as vitiate the policy, nevertheless enters into negotiations or transactions by which it recognizes or treats the policy as still in force, *or by its acts, declarations and dealings leads the insured to regard himself as being protected by the policy*, or induces him to incur trouble or expense, such acts, transactions or declarations will operate as a waiver of the forfeiture and estop the insurer from relying thereon as a defense to an action on the policy. 5 Cooley's Briefs on Insurance, p. 4272; 7 Couch Cyc. of Insurance Law, §1595, p. 5595 *et seq.*

"A provision for forfeiture is inserted in an



insurance policy for the benefit of the insurer, and, like all such provisions, may be waived by the company. Such a provision is binding to the extent that the insured can not ignore it, nor can the courts grant relief against it, but the insurer may waive it, or, by its conduct, lose its right to enforce it. *Thompson v. Knickerbocker Life Ins. Co.*, 104 U. S. 252, 26 L. Ed. 765." 176 Wash. 45-46, 28 P. (2d) 314.

In *Morgan v. Northwestern Nat. Life Ins. Co.*, 42 Wash. 10, 84 Pac. 412, a case cited as authority for the general rule in *Kennedy v. Knights of Macca-bees*, 100 Wash. 36, 170 Pac. 371 (Supra 20), all premiums on the policy were payable in advance to the home office or to agents producing signed receipts. Nonpayment of any premium when due forfeited premiums already paid, and terminated the liability of the company. At first payable quarterly, a change required monthly payment of the premiums. The policy could be reinstated, during insured's life, within twelve months of lapse by reason of nonpayment of premium by the payment of all past due premiums and a fine of ten per cent. per annum thereon. During the last year of insured's life monthly payments were accepted from nineteen to thirty-one days after they were due. The premium due on October 1, 1903, was never paid, the insured dying October 13, 1903. The company refused payment under the policy. In affirming judgment for the plaintiff - beneficiary the court approved the following instruction given below:

"Now, if you find from the evidence that she

made all of the payments of these monthly installments of premium toward the latter part of the month, after the making of the new arrangement, and that the company received them without objection and without calling her attention to the fact that they were payable sooner, and if you further find that, by such course of dealing, she, as a prudent person, was led to believe, and did believe, that she was making these payments according to the terms of this new arrangement, by making them at any time during the month, if you find that she so understood the new arrangement, and that the custom and conduct of the company in receiving these payments without objection were calculated to lead an ordinarily prudent person to so understand and believe, and that she was thereby induced to rest in that belief and understanding at all times previous to her death and that, in consequence of such conduct on the part of the company, she had good reason to believe, and did believe, up to that time that she had paid all these installments as they became due, and that the last one was then overdue, if you find all these facts from the evidence in the case—then I instruct you that the company is estopped and has waived its right to insist upon the forfeiture of this policy by reason of the nonpayment of the last installment of premium; and in that case your verdict should be for the plaintiff.”

42 Wash. 12, 84 Pac. 412.

Proceeding upon the theory that it would be inequitable to allow the company to receive money under such circumstances and disclaim any responsibility to the insured, the court adopted the following language found in a case before the United States Supreme Court where there was a provision



in the policy that the agents were not authorized to waive forfeitures:

“The principle that no one shall be permitted to deny that he intended the natural consequence of his acts when he has induced others to rely upon them is as applicable to insurance companies as it is to individuals, and will serve to solve the difficulty mentioned. This principle is one of sound morals, as well as of sound law, and its enforcement tends to uphold good faith and fair dealing. If, therefore, the conduct of the company in its dealings with the assured in this case, and with others similarly situated, has been such as to induce a belief that so much of the contract as provides for a forfeiture if the premium be not paid on the day it is due would not be enforced if payment were made within a reasonable period afterwards, the company ought not, in common justice to be permitted to allege such forfeiture against one who has acted upon the belief, and subsequently made the payment. And, if acts creating such belief were done by the agent and were subsequently approved by the company, either expressly or by receiving and retaining the premiums, the same consequences should follow.”

*Insurance Co. v. Wolff*, 95 U. S. 326; 24 L. Ed. 387, quoted in *Morgan v. Northwestern Nat. Life Ins. Co.*, 42 Wash. 10, 14, 84 Pac. 412, 413.

The Washington court also adopted the reasoning of another United States Supreme Court case in the following words:

“It was held, in *Hartford, Etc. Ins. Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671, 36 L. ed. 496, that a life insurance company, whose policy provides for the payment of premiums at stated times, and, further, that the holder agrees and accepts the same upon the express



condition that, if the monthly dues are not paid to said company on the day due, then the certificate shall be null and void and of no effect, may nevertheless, by its whole course of dealing with the assured, and by accepting payments of overdue sums without inquiries as to his health, give him a right to believe that the question of his health would not be considered, and that the company would be willing to take his money shortly after it had become due, and such a course of dealing may amount to a waiver of the conditions of forfeiture.

"To the principles announced in those cases we unhesitatingly give our indorsement; and, there appearing to be no errors in the trial of the cause, the judgment is affirmed."

*Morgan v. Northwestern Nat. Life Ins. Co.*, 42

Wash. 10, 16, 84 Pac. 412, 414.

Cases from other jurisdictions which indicate that the rule of waiver or estoppel by custom is of general application are:

*Suits v. Order of United Commercial Travelers of America*, 166 N. W. 222 (Minn., 1918).

*Reisz, v. Supreme Council American Legion of Honor*, 79 N. W. 430 (Wis.).

*West v. National Casualty Co.*, 112 N. E. 115 (Ind. 1916).

*Harris v. Sovereign Camp, W. O. W.*, 23 N. E. (2d) 793 (Ill. App.).

*Nelson v. National Guaranty Life Co.*, 21 P. (2d), 1022 (Cal. 1933); hearing by Supreme Court denied July 7, 1933.

*Bruns v. Milk Wagon Drivers' Union, Local 603*; 242 S. W. 419.

*Edmiston v. The Homesteaders*, 144 Pac. 826 (Kan., 1914).

*Suits v. Order of United Commercial Travelers*, 166 N. W. 222 (Minn. 1918), which applies the general rule of waiver by custom to this appellant's

constitution and by-laws and in particular to the provisions thereof here relied upon by the appellant, will be discussed at a later point in this brief (post 39).

The Wisconsin court applied the general rule heretofore discussed to the facts in *Reisz v. Supreme Council American Legion of Honor*, 79 N. W. 430, and it was held that there had been a waiver. In that case assessments had to be paid on the first and fifteenth of each month. On default the member stood suspended with privilege of reinstatement by payment at any time within 60 days of the delinquent assessment, *together with* all other assessments which had been called before the date of suspension. The insured failed to pay the July first assessment. He died on July tenth. On that day his daughter paid the assessment. The collector endeavored to return it on receiving information of the insured's death but the daughter would not accept it. The records showed payments were frequently made by insured as late as two weeks after the due date and the local secretary testified he was never suspended. *The collector testified he had received single assessments after they were due, although others had also been called, without question of decedent's good standing and was ready to receive the one assessment on July tenth, although those of July fifteenth and July twentieth had been called before July first, and made no sug-*



*gestion of insufficiency thereof until informed of the insured's death.* In applying the general rule and holding that the forfeiture provisions had been waived the court said:

“\* \* \* In the light of the above-mentioned evidence from defendant's officers, and the testimony of plaintiffs that throughout a long period such payments had been made and received from a few days to a month late, with no suggestion that anything more was necessary to set decedent right, and protect his interests, the question of the intent and understanding of the parties was open to the jury, and they were justified in holding that such payments were made and received on the understanding that decedent thereby kept his standing, and not that it was necessary to regain it. From that he might reasonably infer that he was in the future to be accorded a reasonable credit upon his assessments before there should be deemed to be a default causing his suspension, and that the strict letter of his contract had been modified or waived to that extent.” 79 N. W. 431.

#### CREATION OFF THE CUSTOM BY THE SOCIETY ITSELF OR BY ITS LOCAL COLLECTING AGENT.

Appellant in its brief has stressed the fact that the constitution of 1937 provided that no officer or agent of a local council is authorized or permitted to waive any of the provisions of the constitution relating to insurance (Appellant's brief 47, 54-57). Therefore, says the appellant, no matter what Dunn or Watson, the local secretary-treasurers, during the life of the policy, did or did not do, their actions could not have the effect of creating a waiver of the



forfeiture provisions in the constitution. This is answered in two ways.

On the theory of ratification and estoppel it is held in this state that where a local collecting officer continues to collect dues and assessments and remits them to the head office, which retains them, after he, the local collecting officer, has knowledge of facts which will forfeit the certificate of insurance, his knowledge is imputed to and becomes the knowledge of the home office.

In *Peterson v. Modern Woodmen of America*, 127 Wash. 412, 220 Pac. 809, it was specifically provided that no local camp or officer could waive provisions of the by-laws and his knowledge should not be construed to be the knowledge of the home office. The intemperate use of intoxicating liquors voided the policy, forfeited the payments made on it, and the retention by the society of assessments or dues paid either before or after the death of any member of his reinstatement, or any assessments or dues paid subsequently thereto, would not constitute a waiver of any of the provisions of the by-laws.

It was shown that members and officers of the local camp, including the clerk, had known that the insured had become so intemperate in his use of intoxicating liquors that his business and domestic life were disrupted for more than two years prior to the time he committed suicide. The local camp took no action and did not report any of the facts

to the head camp or its officers. The local camp, through its clerk, did continue to accept insured's assessments and dues and transmit them to the head camp. There was judgment on findings favoring the insurance company. This judgment was reversed on appeal.

The appellate court stated that the company's principal contention was that the contract had been voided, and, by the terms of the contract and the provisions of §7278 Rem. Comp. Stat. (later set forth herein), the local camp's failure to act on its knowledge of the insured's intemperance and its failure to advise the head camp thereof did not constitute a waiver of the provisions of the by-laws, and that the acceptance of assessments and sums due did not constitute a waiver of the terms and conditions of the contract. In reversing the trial court the appellate court went on to say:

"Whatever may be the rule in other jurisdictions, cases from which have been freely cited and urged upon us by the respondent, it appears that the cases of *Schuster v. Knights & Ladies of Security*, 60 Wash. 42, 110 Pac. 680, 140 Am. St. 905, and *Shultice v. Modern Woodmen of America*, 67 Wash. 65, 120 Pac. 531, are decisive of this case in favor of the appellant, unless Sec. 7278, Rem. Comp. Stat. (P. C. Sec. 3107), has sufficient effect and application to overcome the rule of those decisions."

127 Wash. 415, 220 Pac. 810.

"The two cases, and others therein cited, are authority for the rule that a certificate of fraternal insurance which becomes suspended and



therefore absolutely null and void, by the terms of the contract, just as in the present case the excessive use of intoxicating liquors by a member shall cause his certificate to become and be absolutely null and void, by the terms of the contract, may be reinstated in spite of facts that prohibit it under the terms of the contract if those facts are known to the collecting officer of the local camp who collects subsequent assessments and dues that are transmitted to and retained by the home office, upon the theory of ratification by and estoppel against the society, because, under the law of agency the knowledge of the collecting officer of the local camp is the knowledge of the society, *and that, notwithstanding an attempt to provide otherwise in the contract.* It is said of the knowledge of the clerk of the local camp that it will be conclusively held to be the knowledge of the Society without regard to whether he communicated the facts to it."

127 Wash. 419-420, 220 Pac. 811 (emphasis supplied).

The *Peterson* case was decided after the adoption of a statutory provision permitting the society to forbid waiver by its agents. This statute (Sec. 225 of the Insurance Code, Laws of 1911, p. 290, Sec. 7278, Rem. Rev. Stat.) was discussed by the court in these words:

"The statute is as follows:

"The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members.

"Very clearly it refers to the power or au-



thority of a subordinate body, its officers and members to waive any of the provisions of the laws and constitution of the society. There is no conflict, however, between the statute and our decisions. *It must be kept in mind that the great, outstanding thought of the decisions in question is not one of waiver at the instance of a subordinate lodge or officer, but, on the contrary, the positive assertion that, by force of the dominating law of agency, the knowledge of the particular officer of a subordinate lodge or camp is necessarily the knowledge of the head camp or society and that, being in the possession of that knowledge, if the society thereafter receives and retains assessments and dues transmitted to it after being collected by the subordinate officer or agent, it thereby ratifies the acceptance by its agent of those assessments and dues and is estopped from denying liability. Or, if the word 'waiver' (so often employed in this class of law for the word 'estoppel') must be used, it is a case wherein the society itself, and not the subordinate camp or officer, because of the society's own knowledge and conduct, through the knowledge and conduct of its agent, will not be permitted to say that it has not waived the provisions of the contract the breach of which by a member would otherwise defeat a right of recovery on behalf of the beneficiary."*

*Peterson v. Modern Woodmen of America*, 127

Wash. 412, 421, 220 Pac. 809, 812.

Secondly, the secretary-treasurer in the instant case testified that a monthly report was mailed by him to the home office at Columbus, Ohio, on the fifteenth of each month and this report of assessments and dues paid and not paid would show who was suspended and who was not (R. 82). There-

fore, with these reports before it the Supreme Council of the Order knew, of its own knowledge, that the insured, Campbell, was customarily permitted to pay dues and assessments long after their due dates, and that he was never suspended and his certificate was never cancelled. It knew that its local collecting officer continued to demand and receive these and subsequent assessments and dues and forward them to it without once putting into effect the forfeiture provisions of the contract. In this view of the case it was not the local collecting officer who performed the acts, omissions and representations which in turn created the custom and waived the provisions of the contract, but the Supreme Council. It is not claimed by appellant that the Supreme Council could not waive the forfeiture provisions if it chose to do so.

On this second point it has been held in similar circumstances that the local agent's knowledge thus became the knowledge of the home office.

*West v. National Casualty Co.*, 112 N. E. 115, 121 (Ind. 1916).

#### APPLYING THE GENERAL RULE TO THE INSTANT CASE.

It is established that a fraternal benefit society, which knowingly and customarily permits the insured to pay assessments and dues long after forfeiture by default, thus leading the insured to regard himself as protected by the policy in spite of reasonably late payments, waives such forfeiture



and is estopped to rely for defense on insured's failure to make a payment before the customary period has elapsed. The facts of the instant case bring it within this rule.

The uncontradicted testimony was to the effect that of 144 payments of dues and assessments made by the insured during the life of the policy, 51 of them were paid from 8 to 128 days after they were due. Of these, 27 payments were made more than 30 days after they were due. Whether it be determined that the 1919 or the 1937 constitution governs the question of the effect of such payment and whatever date Dunn, the local secretary-treasurer, may have referred to as that of change in the assessment provisions from those of 1919 to those of 1937, the fact remains that on at least 27 different occasions insured was more than 30 days in default and *he should have been suspended from membership and insurance in the order under the provisions of both constitutions. This right to suspend insured and cancel the policy was a plain, known, legal right.* This suspension should have been the act of the senior counselor or the secretary-treasurer of the subordinate council under the 1919 constitution (Appendix, 1 *et seq.*). Under the 1937 constitution it was the function of the secretary-treasurer of the local council (R. 62) and it is to be noted that the failure of the officers to suspend the member rendered them liable to summary removal from



office. It does not appear that they were ever removed from office. Mr. Dunn testified that the suspensions are made in Columbus, Ohio, at supreme headquarters.

Under both constitutions suspension from membership resulted in automatic and immediate cancellation of the certificate of insurance. It became null and void (R. 48, 66). Under both constitutions it was necessary in these 27 instances for the insured to cure his default and suspension by formal applications for reinsurance. The company was not forced to reinsure the applicant. It had the plain, known, legal right to refuse to reinsure him if for no other reason than its own caprice or that of three members of the local or subordinate council (R. 50, 64; Appendix, 1 *et seq.*). And under the 1937 constitution, if the suspended member applied for reinsurance within 90 days of his suspension the appellant had the right to require him to sign a statement prepared by the supreme executive committee to the effect that his mental and physical condition was unimpaired in any way that would render him undesirable for insurance (R. 64).

Again, it is uncontradicted that the insured was never suspended from membership or insurance. His certificate was never cancelled, null and void. He was never forced to apply for reinstatement or reinsurance, according to the provisions of either constitution. He never was required to furnish the

statement of physical and mental condition required by the 1937 constitution and the question of his re-insurance was never submitted to the vote or decision of the supreme council or the local council of which he was a member.

The simple truth of the situation was that having failed to put into effect the forfeiture provisions of its constitutions the home office, through its local collecting agent, continued to demand, receive and retain not only the defaulted payments beginning with that due on January 1, 1921, paid February 1, 1921, but 26 additional payments which were more than 30 days overdue when paid and 117 other payments of which some 24 were in default for periods of less than 30 days when they were paid (R. 52).

The cases which have been heretofore discussed (*supra* 20-33) clearly establish that the acts and dealings of the appellant, in permitting the insured to pay dues and assessments long after they were due without putting into effect the forfeiture provisions of the contract and in continuing to demand, accept and retain each and every instalment of dues and assessments for 18½ years has led the insured as a reasonably prudent man to regard himself as protected by the policy. It has led him into a belief that he might pay the instalment within a reasonable time and still be covered by the policy. Thus has the appellant waived its known, legal,



rights under the forfeiture provisions upon which it is now estopped to rely.

But it is contended by the appellant that there is no evidence that by failing to suspend the member on the thirtieth day after default the society intended to waive the provision that the member was not covered during the preceding 30 days.

In answer to this it may be said that the intent of the insurer is not the test of what is or is not waived. The test is what the insured, as a reasonably prudent man, is led to believe as a result of the acts, declarations or dealings of the company.

“In *Trotter v. Grand Lodge of Iowa Legion of Honor*, 132 Iowa 513, 109 N. W. 1099, 7 L. R. A. (N. S.) 569, the rule is stated that the question whether waiver will be found in any particular case depends not upon the intention of the insurer against whom it is asserted, but upon the effect which its conduct or course of business has had upon the beneficiary.”

*Kennedy v. Knights of Maccabees*, 100 Wash. 36, 40, 170 Pac. 371.

Disregarding this clear explanation of the rule, the appellant maintains that in spite of what it did or did not intend to waive, it never waived the provision of non-coverage during the first thirty days after default. In other words, the appellant says, the insured was never covered during this thirty day period, regardless of what had been waived by it after the thirty day period was ended. It seeks to separate “delinquency” and non-coverage during



that time from "suspension" and non-coverage after the thirty days have elapsed. There are two answers to this.

Firstly, both the 1919 and the 1937 constitutions contain penalty provisions embraced within the same articles, and in the latter case, the same section. The more serious consequences follow suspension, the less serious are the result of delinquency. On at least twenty-seven occasions the appellant failed to put into effect the suspension forfeiture provisions, did not require reinstatement, and continued to demand, accept and retain subsequent assessments and dues. On twenty-four other occasions the insured made payments after they were due. Can it be said that the insured, as a reasonable man, was bound to know that the insurer was waiving all forfeiture provisions *except* the one providing for non-coverage during the thirty days following default? As a reasonable man, was he not justified in believing that the appellant would accept his payments, if made within the customary period without relying on any of the forfeiture provisions? The jury found that he was justified in reaching the second conclusion. And when the jury reached this decision it had before it the question of whether or not it believed the statements of appellants' witnesses as to what it *intended* to waive and what it would have done had circumstances sooner presented the question. There

was no evidence that it had established a custom of waiving all but one of its forfeiture provisions.

Secondly, it has been held that *this appellant's* customary acceptance and retention of these late payments was directed to keeping the insured in good standing during the entire life of the policy of insurance. Never having been suspended or reinstated, the constitutional provisions limiting his benefits to periods after his reinstatement would not apply to him.

In *Suits v. Order of United Commercial Travelers*, 166 N. W. 222 (Minn. 1918), *the appellant here was the defendant*, and it relied upon the same clause it relies upon here (R. 47). In that case the insured became a member of the Order on May 28, 1900 and died by accidental means on March 28, 1915. The dues and assessments payable February 24, 1915, had not been paid. As in the instant case the Order of United Commercial Travelers pleaded the default and the constitutional provision barring benefits to the delinquent member until he regained his good standing in the Order. In answer to this the plaintiff alleged a waiver of the forfeiture and delinquency provisions by a practice and custom of accepting and retaining payments from members, including the decedent, at irregular periods after their due date and not insisting upon the forfeiture and reinstatement provisions of the contract, thus leading the insured to believe that he could make



payments within a reasonable time after they were due and still be protected by the policy. The trial court found that the defendant had waived the default and judgment was entered for the plaintiff. The defendant appealed from an order denying its motion for an amendment of the trial court's findings, or for a new trial. The order was affirmed. The court said:

"2. The constitution and laws of the association contain various provisions upon the subject of dues and assessments and the payment thereof, declaring the effect of a failure to pay within the time fixed therefor, all of which are here of no special importance except section 3 of article 7, which treats of the delinquency of insured members, as distinguished, as we understand the matter, from those who are members without insurance. The section provides that if any insured member fails to pay any or all of the dues and assessments levied against him when and as the same become due, he shall immediately on the happening of such default become delinquent and cease to be in good standing as such insured member, and he and every person claiming by, through or under his certificate of insurance 'shall be suspended from any and all rights to indemnity or benefits.' The section further provides:

" 'Should such delinquent member at any time regain his good standing as an insured member in the order, his restoration thereto shall in no wise operate to entitle him or any one claiming under him \* \* \* to indemnity or benefits on account of any accident or injury received by him while not in good standing.'

"It is contended by defendant that by these provisions of the laws of the order the failure to pay assessments when due operates automatically to suspend the member in default,



and that the only effect to be given the act of paying delinquent dues, and the act of the association in accepting them, is to restore the member to good standing, subject to the limitation that restoration to good standing shall not entitle a member or those claiming under his certificate to indemnity for injuries received during the period of suspension. And upon this ground defendant seeks to distinguish the case from *Mueller v. Grand Grove*, 69 Minn. 236, 72 N. W. 48, and other like cases. We are unable to concur in that view of the case. While the automatic suspension cannot be questioned — the association laws are specific in that respect — it is clear that the provisions limiting the rights of suspended members on restoration to good standing are inapplicable to the facts here presented.

“The right of voluntary restoration by the payment of delinquent dues is not given, and the provisions of the constitution upon which defendant relies, properly construed, can have application only to such members as have been restored to membership and to good standing in the manner expressly provided for and permitted by the laws of the order. So far as we are informed by the record there is but one method of such restoration, either provided for or recognized by the association, and that is by petition to and favorable action by the local council of which the petitioner is a member. A restoration to good standing effected in that manner is subject to the reservation of non-liability for injuries received by the insured during the period of suspension. But the record before us furnishes no suggestion that decedent had ever been suspended, or that he ever applied for restoration to good standing in the order. He was at no time treated by the association as under suspension, and his delinquent dues were accepted without intimation on its part that he was either in default or not in good standing. In this situation of the case the con-

tention of defendant cannot be sustained. It is probable that in a given case the payment of delinquent dues and the acceptance thereof by the association might be treated as an application for reinstatement in the order, notwithstanding the existence of an otherwise expressly prescribed method of restoration. But such effect cannot be given the payment and acceptance shown in this case. It does not appear that the association ever permitted restoration to good standing other than in the manner expressly provided by its laws. In this respect the case comes within the rule applied in *Leland v. Modern Samaritans*, 111 Minn. 207, 126 N. W. 728, and *Villmont v. Grand Grove*, 111 Minn. 201, 126 N. W. 730, where on similar facts it was held that the question whether the payment of delinquent dues and assessments was for the purpose of gaining restoration to good standing in the order, or for the purpose of maintaining an existing good standing was one of fact. In those cases it appeared that the by-laws there before us gave to suspended members the right to reinstate themselves by voluntarily paying all delinquent dues. No such right appears in this case. *The payments by decedent therefore are to be attributed to a purpose of maintaining a recognized existing good standing, rather than for the purpose of regaining lost rights. Reisz v. Supreme Council*, 103 Wis. 427, 79 N. W. 430." 166 N. W. 233-224.

To the same effect is the decision in *Brotherhood of Maintenance of Way Employees v. Nolan*, 14 P. (2d) 179 (Colo. 1932). In that case, Butler, J., in dissenting, stated that he did so only because the amount of membership dues was the same and had to be paid regardless of whether or not the member



would be entitled to insurance benefits. There were no additional assessments for insurance. He said:

“\* \* \* If members were required to pay a certain amount as membership dues, and a certain other amount as insurance premium, or insurance dues, an acceptance after the due date of that part paid as insurance premium, or insurance dues, would waive the delinquency and estop the Brotherhood from asserting a forfeiture of the death benefit based upon such delinquency; but, as we have seen, such is not the present case.”

14 P. (2d) 181.

In the instant case insured members paid assessments for their insurance which were separate from their dues which they owed as members. This is conceded by the appellant (Appellant's brief, 3).

Applying the rule of *Suits v. Order of United Commercial Traveler*, 166 N. W. 222 (*supra* 39) and *Brotherhood of Maintenance of Way Employees v. Nolan*, 14 P. (2d) 179 (*supra* 42) to the facts in the instant case, the appellant has on many occasions failed to suspend the insured. In each case it has restored or reinstated him to good standing without requiring that he comply with its formal reinstatement provisions. It has continued to demand, accept and retain each and every installment of dues and assessments without regard to when they were due. It has led him to believe that he might continue to make payments within a reasonable time after they were due and not be subjected to the forfeiture provisions of the contract. He has



continued to do so over a period of eighteen years, believing himself protected by the certificate of insurance at all times. The appellant has thereby waived the failure to pay assessments and dues within the time fixed by the constitution and by-laws and has waived the provisions of the constitution and the contract declaring a forfeiture for the default and is estopped to invoke such forfeiture in an action on the contract.

Never having declared the insured suspended, and the automatic results of default being waived by the appellant, the provisions of the contract, limiting the appellant's liability to injuries occurring after the insured had been restored or reinstated to good standing, have no application to the appellee's claim on the contract. *The payments made by the insured, whether before or after they were due, are to be attributed to a purpose of maintaining a recognized existing good standing in the Order, rather than for the purpose of regaining lost rights.*

It is contended by appellant that the 1937 constitution provides that failure to suspend the delinquent member at the end of the thirty days following default shall not be considered a waiver of the forfeiture provided for. This provision relates to the fact that upon the supreme council discovering that a delinquent member subject to suspension has not been suspended, the supreme council may then

suspend him for the past delinquency. It has no application where the failure to suspend is coupled with a long-continued custom of permitting the insured to pay more than thirty days after the due date. And it is not applicable where the society has demanded, received and retained each and every payment under the policy over a period of eighteen years without regard to when they were paid. And, of course, it, too, may be waived.

*Suits v. Order of United Commercial Travelers*,  
166 N. W. 222 (Minn. 1918), (*supra* 39.).

As the basis for its finding of waiver the jury had before it the many late payments made by the insured, the custom of the local secretary-treasurer to postpone suspension of all members for at least fifteen days after they should have been suspended, the appellant's knowledge of all facts from the reports filed by the secretary-treasurer, the appellant's failure to exercise its known legal right and suspend the insured on twenty-seven occasions when he should have been suspended, the appellant's failure to rely upon its known legal right and insist upon proper application for reinstatement by the insured and his suitability for reinsurance, the appellant's long-continued demand for and acceptance and retention of each and every installment of assessments and dues without regard to when they were due and without regard to previous defaults and cancellations of the policy, and the "courtesy



notice" sent out by appellant's local secretary-treasurer (R. 55) which stated that assessment No. 233 must be paid at once *or* the insured could receive no benefits in case of accident.

Appellant contends that there is no evidence that the insured or the insurer ever treated the policy as in effect during a delinquency period (Appellant's brief, 44). In addition to the evidence referred to in the preceding paragraph, which brings this case clearly within the applicable rules governing the waiver of such forfeiture provisions by the insurer's customary acts, declarations and dealings, and furnishes ample support for the jury's findings, the jury was entitled to presume that the payments made by the insured were for the purpose of maintaining his recognized and existing good standing in the Order. And if that was not the purpose of the Order in accepting such payments, why did it continue to demand payment on a policy it now claims was void by constitutional provisions it had never waived?

*Suits v. Order of United Commercial Travelers*, 166 N. W. 222, 224 (Minn. 1918), (*supra* 39).

*Reisz v. Supreme Council American Legion of Honor*, 79 N. W. 430, 431 (Wis.), see quotation (*supra* 28).

In *Edmiston v. The Homesteaders*, 144 Pac. 826 (Kan. 1914), the provisions of the insurer's by-laws were similar to those of the appellant's constitution. Failure to pay an assessment when due sus-



pended the member from benefits without notice and he remained suspended until reinstated. If he remained suspended for three months he could qualify for reinstatement by filing a certificate of good health and paying arrearages. Insured failed to pay the final assessment before the last day of the month in which it was due. On a question of waiver the court found that it was the custom of the local collecting officer to leave the receipts with a local bank who delivered them to members on receipt of the assessments. To the local collecting officer's knowledge the bank customarily accepted payments as late as seven days after the month in which they were due. The court held that the fact that on two occasions the insured had made payment at the bank after the last day of the month in which the payment was due, was sufficient proof to show that she had knowledge of the custom and that she relied upon it.

As was said in *Head Camp, Pacific Jurisdiction, Woodmen of the World v. Bohanna*, 151 Pac. 428, 430 (Colo. 1915):

“When by the uncontradicted and undisputed testimony plaintiff established that it was the custom of the society to receive assessments from her husband after due, that raised a presumption that it was because of his reliance upon such custom that he failed to pay promptly the assessment in question. She thus carried the burden of showing such reliance.”

151 Pac. 430.

Appellant urges that because insured was killed on the twelfth day after default, only the non-coverage provisions with respect to delinquency are applicable and that whether or not the forfeiture provisions governing defaults of more than thirty days were waived is immaterial to this case (Appellant's brief, 47). However, once a waiver by the custom of accepting late payments is established the member may rely thereon and make payment at any time within the customary period without affecting his good standing or incurring forfeiture. So long as he dies within that customary period, the fact that he has failed to pay the last assessment cannot be urged. This rule is stated and adhered to in the following cases:

*Suits v. Order of United Commercial Travelers*, 166 N. W. 222 (Minn. 1918).

*Edmiston v. The Homesteaders*, 144 Pac. 826, 828, (Kan. 1914).

*Head Camp, Pacific Jurisdiction, Woodmen of the World v. Bohanna*, 151 Pac. 428, 430, (Colo. 1915).

*Morgan v. Northwestern Nat. Life Ins. Co.*, 42 Wash. 10, 12, 84 Pac. 412, 413.

*Trotter v. Grand Lodge of Iowa, Legion of Honor*, 132 Iowa 513, 109 N. W. 1099, 7 L. R. A. (N. S.) 569, 11 Ann. Cas. 533.

The application is well illustrated in *Edmiston v. The Homesteaders*, 144 Pac. 826 (Kan. 1914), where the court said, at page 828 of its opinion:

"It is urged, however, that no reinstatement could be made of Jennie Edmiston after her death, but as we view the question, her death occurring prior to the time at which the custom



permitted payment of the assessment, would make no difference. If she had died on the 29th day of October, with the right to make a payment at any time before the 31st, she would have been a member in good standing, and so if an established custom of the defendant permitted her to pay her assessment as late as the 7th day of the following month, and she had the right to rely on that custom, and to pay at any time before the 7th without a certificate of health, then her death before that day would leave the situation precisely the same as though she had died on the 29th day of the month." 144 Pac. 828.

For various reasons the authorities cited by appellant in its brief are inapplicable to the facts of the instant case.

The appellant has cited several cases defining a waiver to be the voluntary relinquishment of a known right. So far as those cases establish this definition they are correct. Appellant's mistake lies in its contention that it relinquished no known right in the case. As has been said (*supra* 36) in this case the facts involved bring it well within the accepted definition of waiver.

Appellant has quoted at length from *Bunge v. Brotherhood of Maintenance of Way Employees*, 178 Wash. 33, 33 P. (2d) 383, (Appellant's brief, 29-34). The facts in that case clearly distinguish it from the instant one. In that case the by-laws provided that any member who had failed to pay his dues within the month when they fell due, could reinstate himself within six months by paying the



delinquent dues. It was not until the end of the six months' period without his reinstatement in this manner that he was dropped from the rolls and required to do more than pay his arrearages to be reinstated. *Bunge never failed to pay the delinquent dues during the six months' period.* He never could have been dropped from the rolls. The Brotherhood was always required to accept his dues and reinstate him because the six months' period had not elapsed. No custom of waiver had been built up and thus when he failed to pay his July assessment until August 17, 1931, he was subject to the forfeiture provisions of the contract in question.

The following cases, cited by appellant, may also be distinguished from the instant case because, here, on twenty-seven occasions, the appellant was not required to accept payment of arrearages alone and reinstate the insured:

*Richardson v. American National Insurance Co.*, 137 So. 370 (La. 1931), Appellant's brief, 22.

*Stehlik v. Milwaukee Typographical Union No. 23*, 171 N. W. 753, (Wis. 1919), Appellant's brief, 40; (where reinstatements by payment alone had, with two exceptions insufficient to form a custom, been made within the four months' period when the company was forced to accept them).

*Hope v. Travelers Protective Association of America*, 126 S. E. 45, (S. C. 1925), Appellant's brief, 44. (There was no custom here.)

*Phillips v. Fraternal Reserve Association*, 176 N. W. 851, Appellant's brief, 42.

*Wiser v. Central Business Men's Assoc.*, 219 S. W. 102 (Mo. 1920); Appellant's brief, 37, 46; (where a letter from the home office indicated that the last assessment might be paid late without penalty, and thus raised a question of waiver, but not by custom.)

*Rice v. Grand Lodge of A.O.U.W. of Iowa*, 72 N. W. 770 (Iowa 1897), Appellant's brief, 38.

In several cases cited by appellant the constitutions provided that payment of arrearages within the period when they were always paid by the individual insured was sufficient for reinstatement, *provided* the insured was in good health at the time of the payment and, in some cases, remained in good health for a definite period thereafter. In these cases the insured either was not in good health at the time of payment or became sick, was injured or died before the subsequent period elapsed. There was an additional provision in these contracts that retention of the arrearages would not amount to reinstatement until the national secretary or financial officer had "actual, not constructive or imputed" notice that the insured was other than in good health at the time of payment. The practice of reinstating members by accepting arrearages would not waive the requirement that they be in good health. These facts and these constitutional provisions clearly distinguish the following cases, cited by appellant, from the instant one:

*White v. Sovereign Camp, W. O. W.*, 192 S. E. 161, (S. C. 1937), Appellant's brief, 39.

*Balogh v. Supreme Forest, Woodmen's Circle*,



280 N. W. 83, (Mich. 1938), Appellant's brief, 39.

*Sovereign Camp, W. O. W. v. Hart*, 200 S. E. 296 (Ga. 1938), Appellant's brief, 42.

*Taylor v. Latin-American Life and Cas. Ins. Co.*, 94 So. 375 (La. 1922), Appellant's brief, 45.

The State of South Carolina apparently follows a different rule than that expressed in *Peterson v. Modern Woodmen of America*, 127 Wash. 412, 220 Pac. 809, (supra 29) and other Washington cases. In South Carolina a statute prevents the local agent waiving provisions of the by-laws. His knowledge or waiver is not imputed to the home office. For that reason the following cases are inapplicable to the instant case:

*Order of United Commercial Travelers of America v. Belue*, 263 Fed. 502 (C.C.A.-4), Appellant's brief, 25, 48, where it is also pointed out that fraud was an element in that case.

*Sternheimer v. Order of United Commercial Travelers of America*, 93 S. E. 8 (S. C. 1917), Appellant' brief, 51. There was no evidence the Supreme Council had acknowledge of customary acceptance of late payments, and, because of the statute, none could be imputed.

To the same effect and contrary to the Washington law are:

*Northern Assurance Co. v. Grand View Bldg. Assn.*, 182 U. S. 308, 22 S. Ct. 123, 46 L. ed. 313 (Appellant's brief, 55), and, *Modern Woodmen of America v. Tevis*, 117 Fed. 369, (Appellant's brief, 55).

In several of the cases cited by appellant the lodge was required to *and had always in the past formally reinstated insured*. Therefore, no custom of waiving



the reinstatement or forfeiture provisions could arise.

*Elder v. Grand Lodge A.O.U.W. of Minnesota*, 82 N. W. 987, (Minn. 1900) Appellant's brief, 34.

*Jenkins v. Ancient Order of United Workmen of Kansas*, 144 Pac. 223 (Kan. 1914), Appellant's brief, 35.

*Phillips v. Fraternal Reserve Association*, 176 N. W. 851, (Appellant's brief, 42); where in addition, insured was an able lawyer with a wide experience in insurance matters who must have understood and appreciated the legal consequence of his acts.

#### APPELLANT'S LOCAL AGENT WAS A PROPER WITNESS.

On page 9 of its brief appellant refers to the fact that George B. Dunn, its local secretary-treasurer, was permitted to testify on the subject of when the insured paid certain dues and assessments. Since the pleadings raised the question of waiver by custom, the course of dealing between the parties was properly in issue. Dunn knew what those dealings were. His testimony was not only properly admitted but was highly important to the correct determination of the issues. The objection itself was too general to permit the court to rule in appellant's favor.

Furthermore, at the time counsel for appellant objected to Mr. Dunn's testimony the witness was testifying from the Order's account sheets which were conceded to be genuine and which had been

previously admitted in evidence without objection (R. 70). No subsequent objection to Mr. Dunn's testimony was made and, he was later called to testify as appellant's witness and testified as to the course of dealings between the parties, without limiting himself to what appeared on the appellant's account sheets (R. 80-84). It was appellant's contention that the "contract" upon which the objection was based included as its keystone, the 1937 constitution. At the time of the objection the 1937 constitution had not been admitted in evidence and was not before the court.

#### EXCEPTIONS TO INSTRUCTIONS GIVEN AND FAILURE TO INSTRUCT.

Appellant's specifications of errors, numbered III, IV, and V, relate to the giving of the court's instructions and the court's failure to give appellant's requested instructions numbered 4 and 5. While the underlying principles which occasioned the specification have been previously discussed (*supra* 19-49), the specifications themselves cannot be considered because the exceptions based thereon were not taken until the jury had retired to consider its verdict (R. 96) and counsel did not ask the court to recall the jury and correct its alleged errors by re-instructing it.

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to



which he objects and the grounds of his objection.”

*Federal Rules of Civil Procedure, Rule 51.*

Appellee does not rely alone upon the failure to seasonably except to the instructions given and the failure to give the requested instructions. What has previously been said (*supra* 19-49) illustrates that the question of waiver or estoppel by a customary course of dealing was properly before the jury. There was ample evidence to warrant the jury in finding that such a waiver existed and that appellant was estopped to rely upon insured's failure to pay assessment No. 233 on June 30, 1938, (*supra* 33-49). In this state of the case, the court properly submitted the question to the jury on the instructions given. The portion of those instructions quoted in appellant's brief, at page 11, should be considered with reference to the court's entire instructions (R. 91-96).

Appellant's requested instructions numbered 4 and 5 (R. 99) were fully covered in the instructions which the court did give (R. 91-96). Considered alone each of them relates to a specific contention of appellant and, if given alone, without reference to the facts disclosed by the evidence, would have done little but confuse the jury as to the issue properly before it.



## POINT TWO

WHERE THERE HAS BEEN A WAIVER BY CUSTOM OF THE PENALTY PROVISIONS OF A FRATERNAL BENEFIT CONTRACT FOR NON-PAYMENT OR LATE PAYMENT OF ASSESSMENTS AND DUES, A FORFEITURE CANNOT BE DECLARED FOR THE SAME CAUSE WITHOUT SPECIFIC NOTICE TO THE INSURED THAT THE PENALTY PROVISIONS WILL BE INSISTED UPON.

In view of its contention that no waiver or estoppel existed, appellant did not seriously contend that it had nullified such waiver by specifically demanding of the decedent that he pay assessment No. 233 when due or suffer "suspension" and forfeiture. The burden of establishing such nullification was upon the appellant. On the trial it requested no instruction based upon a contention that it had given notice sufficient to accomplish such purpose, and it has not specified error for the court's failure to so instruct.

The evidence was that a regular notice of payment due was contained in the publications of the order and sent to all members. It was allegedly sent to the decedent (although of this no proof was offered) even while the course of custom and habit which lead to the waiver was being developed and followed. Further, appellant's head office, thirty days before payment was due, purportedly sent a regular notice of payment due to all members. This,

too, was a long standing custom. So far as these so-called notices are concerned, they were not a specific demand on this insured which would serve to notify *him* that the company was nullifying its custom and habit and would insist upon its forfeiture provisions as to assessment No. 233. In every previous case where the same notices had been sent the appellant had continued to waive its forfeiture provisions as it had in the past.

Appellant's exhibits B-1 and B-2 are immaterial because the insured in this case was never obligated to pay installment No. 239 (R. 56-57). As to its exhibits B-3 and B-4, this insured had paid assessment No. 232 (R. 58). And, as to appellant's exhibit B-5, it is worded in such a confusing fashion as to be specific notice to no one of any assessment (R. 59).

Appellee introduced in evidence a so-called "courtesy notice" which directed insured's attention to the fact that assessment No. 233 was unpaid and requested him to pay it "*or* he would not be entitled to benefits in case of accident" (R. 55.). This was evidence that the custom of accepting late payments without penalties still was in force. As a "courtesy" this was mailed to all delinquent members by the local secretary within a few days of delinquency. This, too, was a custom of long standing. This particular notice was placed in a sealed envelope addressed to insured's home in Seattle, and post-



marked July 6, 1938. The uncontradicted evidence is that the insured left Seattle on July 3rd or 4th and went to Oregon on a fishing trip. He was accidentally killed on that trip on July 12th. His widow, appellee, returned to their home in Seattle one week later. On or about July 20th, her sister, who was visiting her, brought to her *the unopened envelope* containing the "courtesy notice." Appellee opened the envelope, learned of the delinquency, and later, through a friend, who testified at the trial, tendered payment of the assessment, but it was refused (R. 79). *Campbell, the insured, never received the courtesy notice* (R. 79).

Such courtesy notice is insufficient to nullify the effect of the established waiver. It was appellant's duty, its conduct having occasioned the waiver, to give specific notice and demand to insured before insisting upon the forfeiture provisions it had previously waived. This duty it never performed.

*Douglas v. Hanbury*, 56 Wash. 63, 104 Pac. 1110, is authority for the rule that such definite and specific notice of an intention to insist on the forfeiture provisions must be given. The court quotes with approval from *Watson v. White*, 152 Ill. 364, 38 N. E. 902, as follows:

"He knew that all along, from the beginning, the clause declaring time to be of the essence of the contract, and other like clauses, had, by tacit agreement, remained in abeyance, and that all claims under them had been continu-



ously waived. It may be that the rights of Fix under said clauses of the contract were not absolutely and permanently waived, but from the standpoint of a court of equity they were at least temporarily suspended, and capable of being reinstated only by giving a definite and specific notice of an intention to act under them. Good faith and square dealing required that much."

56 Wash. 65, 104 Pac. 1111.

Placing in the mails a much more definite and specific notice than the one in this case is not giving such notice to the insured. Here, not only does it fail to appear that such notice was given, but it affirmatively appears that no notice was ever given insured.

*Had appellant ever intended to nullify its custom and had it intended to do so by any of the notices introduced in evidence in this case it would have been a simple thing for it to show that the custom was nullified in all other instances and that all its other members knew of and acted in accordance with the nullification as a result of these notices. But not one bit of evidence to this effect was offered.*

### POINT THREE

WHERE A CREDIT EXISTS ON THE BOOKS OF A FRATERNAL BENEFIT ASSOCIATION IN FAVOR OF AN INSURED MEMBER IT MUST BE APPLIED TO THAT INSURED'S DELINQUENT DUES AND ASSESSMENTS, SO FAR AS IT WILL GO, AND HE CANNOT BE SUSPENDED FOR DEFAULT IN PAYMENT UNTIL THE CREDIT IS EXHAUSTED.

An additional theory upon which appellee asked

for relief in the district court was that assessment No. 233, due on June 30, 1938, had been paid by the insured prior to his death by reason of a credit in his favor appearing on appellant's books. Appellee's exhibit No. 4 (R. 54), an account sheet of the Order, indicated on one side that \$10.00 had been collected from the insured on December 20, 1919, and this further entry appeared:

"Credit as follow	Am't
Assessment No. 153	2. "

On the other side of the same exhibit it appears that assessment No. 154, which was due January 1, 1920, was paid by the insured December 20, 1919, and that assessment No. 155, which was due April 15, 1920, was paid by the insured on April 5, 1920 (R. 52). The insurance became effective January 3, 1920 (R. 41-42).

The 1919 constitution provided that assessments were to be called and levied by the Supreme Secretary at least 45 days before the date upon which they were finally due (R. 46). No assessment for any purpose could be levied against a newly initiated member within the two calendar months succeeding that within which he was insured (R. 45-46).

It was appelle's contention that the following credits existed in favor of the insured's account:

1. \$2.00 because assessment No. 153 was assessed and collected before Mr. Campbell was insured;



2. \$2.00 because assessment No. 154 was assessed and collected before the end of the second calendar month following that in which Mr. Campbell was insured; and,
3. \$2.00 because assessment No. 155, which was due April 15, 1920, had been called and levied against Mr. Campbell before the end of the second month following that in which he was insured.

This would establish a credit of \$6.00 in the insured's favor.

A member of a fraternal benefit association is not "insured" until the corporation is bound to pay benefits for injuries to the member within the meaning of the certificate. Here, that date was January 3, 1920.

*Logsdon v. Supreme Lodge of the Fraternal Union of America*, 34 Wash. 666, 76 Pac. 292.

Appellant, being possessed of a sum deposited with it by the insured to pay assessments and dues, was bound to pay assessment No. 233 with that sum and could not insist upon the penalty provisions of the contract arising from non-payment of that assessment.

*Logsdon v. Supreme Lodge of the Fraternal Union of America*, 34 Wash. 666, 76 Pac. 292.

*Supreme Lodge of Patriarchs of America v. Welsch*, 60 Kan. 858, apprx., 57 Pac. 115.

*Fraternal Aid Ass'n. v. Powers*, 67 Kan. 420, 73 Pac. 65.

*Knight v. Supreme Council, Order of Chosen*



*Friends*, 2 Silv. Sup. Ct. 453, 6 N. Y. Supp. 427.  
*Evarts v. United States Mut. Acci. Assoc.*, 40  
N. Y. S. R. 878, 16 N. Y. Supp. 27.

In withdrawing the question of credits from the jury the court directed its attention to whether \$2.00 had actually been collected from insured for assessment 153 or 154 (R. 88-89). The court based its withdrawal of the question on the testimony of J. W. Watson, the former secretary-treasurer of the local council, (R. 85) and concluded that the witness had satisfactorily explained that the entry opposite assessment 153 (R. 54) was mistakenly made before he knew that insured's certificate would not be effective until assessment No. 154 was called. The court refused to submit to the jury the conflict of evidence between the exhibit and the witness and the question of whether the witness was telling the truth.

Over objection of appellee's counsel, the court ignored the question of the credits arising from the fact that assessment 154 had been called, levied and collected and assessment 155 had been called and levied prior to two calendar months following January, 1920, the month in which insured was initiated. Therefore, appellee urges upon this Court, as a further reason why judgment in her favor should be affirmed, the fact that the existence of a credit of \$6.00, \$4.00 or \$2.00, any of which would have prevented forfeiture, was not properly left to the determination of the jury. At the very least, the court

should have passed upon the question of the credit raised by the appellee's second and third contentions (supra 61).

The fact that assessment No. 233 was for \$4.00 plus dues of \$1.00, and the credit might only be for \$2.00 is unimportant, since partial payment of an assessment by application of a credit in possession of appellant results in a proportionate coverage under the certificate.

*Russell v. Wash. Fire Relief Assoc.*, 134 Wash. 309, 235 Pac. 954.

### CONCLUSION

Construing all the evidence adduced at the trial in the light of the established rules of law in this state, the court properly submitted to the jury the question of whether the appellant had, by a custom or course of dealing, lead the insured, as a reasonably prudent man, to believe that he could safely continue to make payments on his certificate of insurance within a reasonable time after they were due and still remain in good standing and protected by the certificate. The accompanying question of whether the insured had relied on such custom in failing to pay assessment No. 233 on June 30, 1938, was also properly submitted to the jury.

Considering all the evidence in the case and the applicable rules of law the district court could not have said, as a matter of law, that there was no evidence upon which the jury could base a finding that

appellant had waived the penalty provisions of its contract and was estopped to rely upon insured's failure to pay assessment No. 233, due June 30, 1938, prior to his death on July 12, 1938.

The district court's instructions to the jury correctly presented the law and facts to the jury. There was no error in the court's failure to give appellant's requested instructions in the language in which they were drawn.

Upon the ground and for the reasons urged in this brief, it is now submitted that the judgment of the court below should be affirmed.

Dated at Seattle, Washington

August 24, 1940.

Respectfully submitted,

JONES & BRONSON

WHEELER GREY,

*Attorneys for appellee,  
Estelle Campbell.*



# APPENDIX



## APPENDIX

PLAINTIFF'S EXHIBIT "3", Adm. Jan. 17, 1940,  
Supplemental Extracts from the Constitution and  
By-Laws of the defendant corporation, effective  
September 1, 1919.

Art. IV, Sec. 7; p. 56:

### "SUSPENSIONS

"Sec. 7. Any member who fails to pay the fees, fines, costs, dues or any assessment charged or levied against him, when and as same become due and payable, shall immediately on the happening of such default and by virtue thereof become a delinquent member, and he and every person or persons claiming under him and by virtue of his membership and his certificate of insurance shall likewise, at the time such default occurs and by virtue thereof, forfeit all right to indemnity and benefits of whatsoever character; while he thus continues a delinquent member the sending to him of notice of any assessment or the making of demand on him for any fees, fines, costs, dues or assessments shall not constitute or be a waiver of such forfeiture.

"Should any delinquent member, at any time, regain his good standing in the Order, his restoration thereto shall in nowise operate to entitle him or anyone claiming by, through or under him or his certificate of membership or insurance to indemnity or benefits on account of any accident or injury re-



ceived by him while not in good standing, or on account of death resulting therefrom.

“Any member who shall have failed to pay all fees, fines, costs, dues or assessments charged or levied against him when and as the same become due and payable, and who has not restored himself to good standing at or before the time fixed for the next regular meeting of his Subordinate Council after the same shall become due and payable, by paying all such sums due, shall, at such meeting of his Subordinate Council, be suspended from the Order by the Senior Counselor, or, in his absence, by the presiding officer.

“Should any Subordinate Council, however, for any reason, fail at any time to hold its regular meeting, and should there be any member or members thereof at that time who are in default for the payment of any fees, fines, costs, dues or assessment, the Secretary-Treasurer of such Council shall, on the date of such meeting, enter on his books the suspension of all such members so in default, and such suspension shall become and be operative from and as of such date, and such Secretary-Treasurer shall report to the Supreme Secretary and to his Subordinate Council, at the next regular meeting held by it, the name of the member or members so suspended and the date of such suspension.

“The failure to suspend a delinquent member under the provisions of this section shall not constitute

or be a waiver of the forfeiture provided for in this section, and the officer so failing to suspend may be summarily removed from office by the Supreme Counselor."

Art. IV, Sec. 8, p. 57:

### "REINSTATEMENTS

"Sec. 8. Any member suspended under the provisions of the foregoing section, desiring reinstatement, shall make application therefor on a blank prepared by the Supreme Executive Committee, to the Council from which he was suspended, and shall accompany such application with a sum equal to the dues for the current period in which he applies for reinstatement, and also one assessment. On the receipt of such application and payment, the Secretary-Treasurer of his Council shall present such request at the next regular meeting of his Council. Each application shall be referred to a committee of three for investigation, upon whose report a ball ballot shall then be taken upon such application, and if not more than two adverse ballots appear, the Senior Counselor shall declare the applicant reinstated to membership."

DEFENDANT'S EXHIBIT "B-6", Adm. Jan. 17, 1940, Supplemental Extracts from the Constitu-

tion and By-Laws of the defendant corporation, effective September 1, 1937.

Art. IV, Sec. 13, p. 47, line 37:

**“WAIVERS**

“No Grand or Local Council, officer, member or agent of any Local, Grand or the Supreme Council of the Order is authorized or permitted to waive any of the provisions of the Constitution of this Order, relating to insurance, as the same are now in force or may be thereafter enacted.”



United States  
Circuit Court of Appeals

For the Ninth Circuit. 7

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FIRST PRESBYTERIAN CHURCH OF SANTA  
BARBARA, CALIFORNIA, a religious corpo-  
ration,

Appellant,

vs.

M. L. RABBITT, as Trustee in Bankruptcy of the  
Bankrupt Estate of James Marwick, and  
JAMES MARWICK,

Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United  
States for the Southern District of California,  
Central Division

FILED

JUL 24 1940

PAUL F. O'BRIEN,



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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FIRST PRESBYTERIAN CHURCH OF SANTA  
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Upon Appeal from the District Court of the United  
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\*Page numbering appearing at foot of page of original certified  
Transcript of Record.



In the District Court of the United States,  
Southern District of California,  
Central Division

No. 1428-H

M. L. RABBITT, as Trustee in Bankruptcy of the  
Bankrupt Estate of James Marwick,  
Plaintiff,

vs.

FIRST PRESBYTERIAN CHURCH OF SANTA  
BARBARA, CALIFORNIA, a religious cor-  
poration, and JAMES MARWICK,  
Defendants.

### BILL IN EQUITY

To the Honorable Judges of the United States Dis-  
trict Court in and for the Southern District of  
California, Central Division:

Plaintiff complains of defendants and each of  
them and for a first cause of action alleges:

#### I.

That plaintiff now is and has been at all times  
since the 16th day of May, 1938, the duly appointed,  
qualified and acting Trustee of the bankrupt estate  
of James Marwick, which said bankrupt estate is  
now pending before the above entitled Court and is  
number 28189-S in the records and files of the above  
entitled Court. The said Marwick was duly adjudi-  
cated a bankrupt on the 10th day of July, 1936, in

the said proceeding number 28189-S and at all times since the said adjudication of the said James Marwick the said bankruptcy matter has been pending and has at no time been closed.

Defendant, First Presbyterian Church of Santa Barbara, California is and has been at all times herein mentioned a non-profit corporation duly organized and existing under and by virtue of the laws of the State of California with its principal place of business and with its principal location at and in the County of Santa Barbara, State of California and within the above named judicial district. [2]

Defendant, James Marwick, is and has been at all times herein mentioned a resident of the County of Los Angeles, State of California and within the above named judicial district, and at all times hereafter the said James Marwick will be herein referred to as the bankrupt.

## II.

There are two certain judgments which have been duly recovered and entered against the bankrupt as follows, to-wit:

A. Prior to the 21st day of September, 1932 an action was duly and regularly filed in the Superior Court of the State of California in and for the County of Los Angeles entitled Marie Scheinman, Plaintiff, vs. James Marwick and others, defendants, being number 344292 in the records and files

of the said Superior Court. Thereafter and on the 21st day of September, 1932 and in the said Superior Court action judgment was duly entered in favor of the said Marie Scheinman and against the bankrupt for the total sum of Fifty-seven Thousand One Hundred Twenty-eight and 17/100 (\$57,128.17) Dollars. The laws of the State of California provide that interest shall accrue on unsatisfied judgments at the rate of Seven (7%) per cent per annum, and there is, therefore, now due, owing and unpaid from the bankrupt to the said Marie Scheinman by virtue of the said judgment, the total sum or in excess of Fifty-seven Thousand One Hundred Twenty-eight and 17/100 (\$57,128.17) Dollars. The said complaint, filed as aforesaid by the said Marie Scheinman and the said judgment were based upon a certain promissory note executed in favor of the said Marie Scheinman by the bankrupt on the 1st day of December, 1927 in the principal sum of \$55,000.00 and the indebtedness evidenced by the said judgment has been due to the said Marie Scheinman from the bankrupt at all times since the said December 1st, 1927. No part of the said principal sum of Fifty-five Thousand (\$55,000.00) Dollars has ever been paid. The said Marie Scheinman has duly proved her claim based upon the said judgment in the said bankruptcy matter of James Marwick [3] within the time provided by law, and the said claim has been duly allowed.

B. Prior to the 26th day of February, 1936 the Assets Corporation, a corporation duly organ-



ized and existing under and by virtue of the laws of the State of California commenced an action in the Superior Court of the State of California in and for the County of Los Angeles entitled Assets Corporation, plaintiff vs. James Marwick, defendant, and being number 375933 in the records and files of the said Superior Court, and thereafter and on the 26th day of February, 1936 judgment was duly entered in the said Superior Court action in favor of the said Assets Corporation and against the bankrupt in the total sum of Fourteen Thousand Eight Hundred Fifty-three and 66/100 (\$14,853.66) Dollars. The said last mentioned Superior Court action and the said judgment in favor of the said Assets Corporation were based upon a promissory note in the sum of Forty-five Thousand (\$45,000.00) Dollars executed on or about August 14, 1928, by the bankrupt in favor of Security First National Bank of Los Angeles, which said promissory note was sold, assigned and transferred by the said Security First National Bank to the said Assets Corporation prior to the commencement of the said action in the said Superior Court. The promissory note dated August 14, 1928 was the renewal of an indebtedness theretofore existing in favor of the said Security First National Bank and against the bankrupt, which said indebtedness existed at all times since December 22, 1922. No part of the said judgment entered in the said Superior Court action in favor of the said Assets Corporation and against the bankrupt has ever been paid and there is now

due, owing and unpaid from the bankrupt to the said Assets Corporation in excess of the sum of Fourteen Thousand Eight Hundred Fifty-three and 66/100 (\$14,853.66) Dollars by reason of the said judgment. The said Assets Corporation has duly proved its claim in the said bankruptcy matter of James Marwick within the time provided [4] by law, and the said claim has been duly allowed.

### III.

That for some time prior to November 28, 1927 and at all times subsequent thereto to and including on or about the 30th day of March, 1932 the said James Marwick was the owner of certain real property in the County of Santa Barbara, State of California, which said property is described as follows:

Beginning at the southeast corner of Lot 61, Santa Barbara Estates, as shown in Book 15, at pages 51 to 56 of Maps, records of Santa Barbara County; thence south  $82^{\circ}25'$  west, 518.23 feet to a point on the easterly line of a road known as Cuervo Avenue, also known as Collado Avenue; thence easterly and northerly along said Cuervo Avenue, the following courses and distances: on a curve concave to the northwest, said curve having a delta of  $25^{\circ}25'35''$ , a radius of 63.67 feet, along the arc of said curve 28.26 feet to the end of curve; thence on a curve concave to the southeast, said curve having a delta of  $48^{\circ}43'30''$  and radius of 12.85 feet, along arc of said curve 10.93 feet to the end of curve; thence on a curve concave to the east,

said curve having a delta of  $15^{\circ}00'$ , radius of 352.25 feet, along the arc of said curve 92.22 feet to the end of curve; thence along a curve concave to the west, said curve having a delta of  $40^{\circ}30'$ , radius of 136.35 feet, along the arc of said curve 96.38 feet to the end of curve; thence on a curve concave to east, said curve having a delta of  $40^{\circ}00'$ , radius 149.20 feet, along the arc of said curve 104.16 feet to the end of curve; thence on a curve concave to the northeast, said curve having a delta of  $72^{\circ}00'$ , radius of 89.58 feet, along the arc of said curve 112.57 feet to the end of curve; thence along a curve concave to the south, said curve having a delta of  $31^{\circ}30'$ , radius 303.22 feet; thence along the arc of said curve 166.70 feet to the end of the curve; thence along a curve concave to north, said curve having a delta of  $53^{\circ}45'30''$ , radius 65.76 feet, along the arc of said curve 61.70 feet to end of curve; thence [5] north  $61^{\circ}44'30''$  east 197.56 feet to a point on the easterly line of Lot 67 of Hope Ranch Park Subdivision, as shown on the Map recorded in Book 2, at page 24, of Maps and Surveys, in the office of the County Recorder of said County; thence continuing along said course north  $61^{\circ}44'30''$  east 145.51 feet to a point; thence north  $32^{\circ}00'$  west 241.86 feet to a point on the easterly line of said Lot 67 as shown on said map recorded in Book 2, at page 24, of Maps and Surveys; thence along the easterly line of Lots 67 and 69, north 100.00 feet to the point of beginning. Being a part of Lots 67, 66 and 69 of Hope Ranch Park Subdivision according



to Map No. 1 recorded in Book 2, at page 24, of Maps and Surveys, in the office of the County Recorder of said County; and part of Lots 3 and 4, Subdivision of the Estate of Thomas Hope, deceased, as per Map filed in the Superior Court for Santa Barbara County in Case No. 1021, in the Matter of the Partition of the Estate of Thomas Hope, deceased. [6]

#### IV.

On or about the 30th day of March, 1932 the bankrupt made and caused to be recorded in the office of the County Recorder of the County of Santa Barbara, State of California a certain deed which said deed purported to convey the said real property from the bankrupt to the First Presbyterian Church of Santa Barbara, California. The said deed was recorded in book 259, page 305 of official records of the said County of Santa Barbara. By reason of the recording of the said deed defendant, First Presbyterian Church of Santa Barbara, California, now claims to be the owner and holder of the said real property and is now in possession thereof. The said transfer of the said real property from the bankrupt to defendant First Presbyterian Church of Santa Barbara, California as evidenced by the said deed was made and given by the bankrupt voluntarily and without a valuable or any consideration and was made by the bankrupt while he was insolvent and while he contemplated insolvency, and was made at a time when the bankrupt was indebted to the said Marie Scheinman and to

the predecessors in interest of the said Assets Corporation upon the obligations herein above described. Plaintiff is informed and believes and by reason of such information and belief alleges that at all times since January 1st, 1927 the bankrupt has been insolvent and that at all times since January 1st, 1927 the debts of the bankrupt have greatly exceeded the fair and reasonable value of the assets of the bankrupt.

#### V.

By reason of the facts herein alleged, the said transfer of the said real property from the bankrupt to defendant, First Presbyterian Church of Santa Barbara, California, was and is *fraudulent* and void, and plaintiff as Trustee of the bankrupt estate of the bankrupt is the owner of, and is entitled to the possession of the said real property. [7]

#### VI.

By reason of the facts herein alleged plaintiff has no plain, speedy or adequate remedy at law.

For a second, separate and distinct cause of action against defendants, plaintiff complains and alleges:

#### I.

Repeats by reference thereto each and every allegation contained in Paragraphs I, II, III, IV, V and VI of plaintiff's first cause of action with the same force and effect as though each and all of said allegations were hereat set forth in full.

## II.

Plaintiff is informed and believes and by reason of such information and belief alleges that the said transfer of the said real property as evidenced by the said deed was made and given by the bankrupt and received by defendant First Presbyterian Church of Santa Barbara, California for the purpose of and with the actual intent on the part of both of the said defendants to hinder, delay and defraud the creditors of the bankrupt.

For a third, separate and distinct cause of action against defendants, plaintiff complains and alleges:

## I.

Repeats by reference thereto each and every allegation contained in Paragraphs I, II, III, IV, V and VI of plaintiff's first cause of action with the same force and effect as though each and all of said allegations were hereat set forth in full.

## II.

As herein above alleged defendant First Presbyterian Church of Santa Barbara, California has been in possession of the said real property at all times since on or about March 30, 1932. Plaintiff is informed and believes and by reason of such information and belief alleges that the said defendant has collected and received substantial income or rentals from the said real property during the said period [8] of time to all of which said income and rentals plaintiff is entitled. Plaintiff has demanded



of defendant, First Presbyterian Church of Santa Barbara, California, that said defendant account to and pay over to plaintiff all such income and rentals received or derived from the said real property, but that the said defendant has failed and refused so to do. The said defendant has exclusive knowledge of the amounts of the incomes and rentals received aforesaid and plaintiff has no method of ascertaining the same except by an accounting from the said defendant.

Wherefore, plaintiff prays judgment of and from defendants and each of them as follows:

1. That the Court adjudge and decree that plaintiff, as Trustee of the bankrupt estate of James Marwick, is the owner of and is entitled to the possession of the real property herein above described.

2. That the Court adjudge and decree that the deed herein above described be declared by this Court to be void and of no force and effect, and that the Court adjudge that the said real property was the property of defendant James Marwick at all times prior to the commencement of this bankruptcy proceeding.

3. That the Court adjudge and decree that plaintiff is entitled to have and recover of and from defendant, First Presbyterian Church of Santa Barbara, California, all rents, issues and profits derived from said defendant during the time it has been in possession of the said real property, and that in this connection the Court order the said

defendant to account to plaintiff for the said rents, issues and profits.

4. And for such other and further relief as may be just and equitable and for general relief.

5. For plaintiff's costs in this action incurred.

EDWARD GALLAUDET

HUBERT LAUGHARN

SAMPSON MILLER

By EDWARD GALLAUDET

Attorneys for Plaintiff [9]

State of California,

County of Los Angeles—ss.

M. L. Rabbitt, being by me first duly sworn deposes and says: That he is the Plaintiff in the above entitled action; that he has read the foregoing Bill in Equity and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

M. L. RABBITT

Subscribed and sworn to before me this 22nd day of July, 1938.

[Seal]

FLORENCE ROBINSON

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jul. 29, 1938. [10]

[Title of District Court and Cause.]

ANSWER OF FIRST PRESBYTERIAN  
CHURCH OF SANTA BARBARA,  
CALIFORNIA.

Comes now the above named defendant, First Presbyterian Church of Santa Barbara, California, a religious corporation, and in answer to plaintiff's bill of complaint on file herein denies, admits and alleges as follows, to-wit:

I.

Answering paragraph II of the first cause of action set forth in said complaint, said defendant alleges that it has no information or belief as to the allegations therein set forth, and upon such lack of information and belief denies said paragraph, the whole thereof and each and every allegation therein set forth.

II.

Answering paragraph III of the first cause of action set forth in said complaint, said defendant denies that the said James Marwick was the owner of said parcel of land described in [11] said complaint after the 28th day of November, 1927, and in this regard alleges that the said James Marwick, prior to the 28th day of November, 1927, made and entered into a certain subscription agreement by the terms of which he agreed to pay to the said answering defendant the sum of \$25,000.00 for the reconstruction of the house of worship of said answering defendant for and in consideration of the



promises of certain other members of said First Presbyterian Church of Santa Barbara, California, to pay to said First Presbyterian Church certain sums by them subscribed; that each and all said subscribing members of said church paid to said defendant the amount by them and each of them subscribed and that in reliance upon the said promise of the said James Marwick the said defendant expended upon the said reconstruction of said house of worship the total of all the sums so subscribed, including the said \$25,000.00 subscribed by the said James Marwick.

That thereafter, upon the said 28th day of November, 1927, the said James Marwick, to secure the payment of said promise by him made, to pay said sum of \$25,000.00 to said defendant, did make, execute and deliver to said defendant a certain deed of trust, a copy of which said deed of trust is hereto attached and made a part hereof as "Exhibit A"; that said deed of trust was duly recorded in Book 262, page 267, of the Official Records of the County of Santa Barbara, State of California, on the 24th day of March, 1932; that by the terms of said deed of trust said James Marwick did irrevocably transfer and assign said real property described in said paragraph III unto said defendant as security for the payment of said sum of \$25,000.00.

That said sum of \$25,000.00 has not, nor has any part thereof, been paid. [12]

## III.

Answering paragraph IV of the first cause of action set forth in said complaint, said defendant admits that said James Marwick did transfer said real property to said defendant by deed and in this regard alleges said deed to be in words and figures as set forth in “Exhibit B”, hereto attached and by this reference made a part hereof. Said defendant denies that said deed was given and said transfer made without adequate consideration and in this regard alleges that said deed and said transfer were given and made for a good, valuable, adequate and full consideration in full payment of said obligation evidenced by said subscription agreement and said deed of trust; said defendant has no information and/or belief as to the remaining allegations in said paragraph IV not specifically denied or admitted herein, and upon such lack of information and/or belief denies said remaining allegations.

## IV.

Answering paragraph V of the first cause of action of said complaint, this answering defendant denies said paragraph, the whole thereof and each and every allegation therein contained.

## V.

Answering paragraph VI of said first cause of action set forth in said complaint, this answering defendant denies said paragraph, the whole thereof and each and every allegation therein contained.

## Answer to Second Cause of Action.

## I.

Answering paragraph I of the second cause of action set forth in said complaint and paragraphs II, III, IV, V and VI of the first cause of action realleged in said first paragraph, this answering defendant realleges paragraphs I, II, III, IV and [13] V of its answer to the first cause of action in said complaint set forth as though here set forth in full.

## II.

Answering paragraph II of the second cause of action set forth in said complaint, this answering defendant denies said paragraph, the whole thereof and each and every allegation therein contained.

## Answer to Third Cause of Action.

Answering paragraph I of the third cause of action set forth in said complaint and paragraphs II, III, IV, V and VI of the first cause of action realleged in said first paragraph, this answering defendant realleges paragraphs I, II, III, IV and V of its answer to the first cause of action in said complaint set forth as though here set forth in full.

## II.

Answering paragraph II of the third cause of action set forth in said complaint, this answering defendant denies said paragraph, the whole thereof and each and every allegation therein contained.



By way of a separate and distinct affirmative defense to said Bill of Complaint and to each and every cause of action therein set forth, said defendant alleges:

I.

That said complaint and each and every cause of action therein set forth is barred by the provisions of Subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California.

II.

That said complaint and each and every cause of action therein set forth is barred by the provisions of Section 318 of [14] the Code of Civil Procedure of the State of California.

III.

That said complaint and each and every cause of action therein set forth is barred by the provisions of Section 319 of the Code of Civil Procedure of the State of California.

By way of a second separate and distinct affirmative defense to said Bill of Complaint and to each and every cause of action therein set forth, said defendant alleges:

I.

That continuously and for a period of more than five years next preceding the filing of the above entitled action, said defendant has been in possession of said real property, adversely, under claim

of right, openly, notoriously and to the exclusion of the above named plaintiff and all other persons claiming an interest in said real property and has paid all taxes and assessments levied and/or assessed against said real property during said period.

By way of counter claim to plaintiff's said Bill of Complaint and to each and every cause of action therein set forth, said defendant alleges:

I.

That said defendant, since the said 28th day of November, 1927, has in good faith, paid taxes and assessments levied against said real property in the sum of \$392.77.

Wherefore, said defendant prays that said Bill of Complaint be dismissed and that said defendant be sent hence with its costs.

That said defendant, in the event that said deed be declared void and of no effect by the court, be declared to have a lien against said real property in the sum of \$392.77 taxes advanced and paid upon said property. [15]

For such further and additional general relief as is just in the premises.

SCHAUER, RYON & McMAHON,  
Attorneys for defendant First  
Presbyterian Church of Santa  
Barbara, California.

By FRED H. SCHAUER.

State of California,  
County of Santa Barbara—ss.

William G. Griffith, being by me first duly sworn, deposes and says: That he is an officer, to wit, President of the Board of Trustees of said answering defendant; that he has read the foregoing Answer of First Presbyterian Church of Santa Barbara, California, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

WILLIAM G. GRIFFITH.

Subscribed and sworn to before me this 30th day of September, 1938.

[Notarial Seal] MABEL REYNOLDS,  
Notary Public in and for the County of Santa Barbara, State of California.

(For Exhibit “A” attached hereto see Defendants’ Exhibit “B” in evidence.)

(For Exhibit “B” attached hereto see Plaintiff’s Exhibit No. 2 in evidence.)

[Endorsed]: Filed Oct. 1, 1938. [16]



[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS AND  
MINUTE ORDER

Judge Hollzer's Calendar, Nov. 3, 1939.

This is a suit by the trustee of the estate in bankruptcy of defendant Marwick to set aside an alleged fraudulent conveyance. The complaint is in two counts.

The first is founded upon the theory that a certain deed given to the defendant Church by the co-defendant Marwick in 1932 was executed and delivered without a valuable consideration and while the grantor was insolvent, and hence was fraudulent and void as to existing creditors.

The second count is founded upon the contention that said conveyance was made with the actual intent to hinder and delay creditors and while the grantor was insolvent and therefore was fraudulent.

By their respective answers both the defendant Church and its co-defendant Marwick have alleged that said deed was delivered in payment of a previously made pledge on the part of Marwick, whereby he promised to pay \$25,000 for the reconstruction of the Church's house of worship in consideration of the promises of others to make contributions for the same purpose, also [17] that the latter paid their subscriptions, and that in reliance upon Marwick's promise the defendant Church expended upon the reconstruction of its house of worship the sums subscribed, including the amount subscribed by Marwick.

It was stipulated that a claim upon a judgment entered September 21, 1932 in favor of one Marie Scheinman for \$57,128.18, based upon a note given to her by Marwick under date of December 1, 1927, and also that a claim upon a deficiency judgment entered February 26, 1936 in favor of Assets Corporation for \$14,543.16, plus attorneys fees, based upon a note and trust deed given to it by Marwick under date of August 14, 1928, had been properly filed and allowed against the Marwick estate, and that neither of said judgments had been satisfied.

The evidence that Marwick made a promise of the character described in the answers is to be found in Defendants' Exhibit B, referred to as a Declaration or Deed of Trust, executed by the grantor in 1927. The latter instrument provides in part that Marwick holds the property in question "in trust for and as security for the payment of \$25,000" to the defendant Church and also that in the event of his death prior to paying said \$25,000 or in the event of his failure to pay the same within ten years from date, "then said First Presbyterian Church of Santa Barbara shall take record title to said property and be the sole owner thereof." Said instrument further provides that the maker had theretofore agreed to pay to said Church \$25,000 to be applied toward the reconstruction of its house of worship and the building of additions thereto, [18] that said agreement had been predicated upon Marwick being able to sell certain real property,

and that "said property has been sold but under terms and conditions which will not admit of the payment of said sum of \$25,000 in cash."

On the other hand, the testimony of George W. Wilson, a witness produced on behalf of the defendant Church was to the effect that in January of 1927, at a meeting of the congregation, the minister appeared on the platform with Marwick and announced that the latter had made a subscription of \$25,000 toward liquidating the Church's debt. Wilson further testified that upon said occasion he and a number of others, upon the strength of that subscription, made contributions, all of which together totalled the entire amount of the Church's debt.

In view of the recitals in said Declaration of Trust, the only reasonable conclusion to be reached from the evidence is that the promise given by Marwick was not of the character described by the witness Wilson, whose testimony was based upon his recollection of events occurring more than twelve years ago, but rather was a pledge of the kind mentioned in said Declaration of Trust. In this connection it should be noted that the latter promise is consistent, while the former is inconsistent, with the respective answers of the two defendants. This latter promise, however, was conditional, that is to say, the subscription was restricted to be applied toward the reconstruction of the Church's house of worship and the building of additions thereto. Furthermore, as disclosed by



said Declaration of Trust, the property involved herein [19] was not to be acquired by the defendant Church unless the promisor died prior to paying said subscription or failed to pay the same within ten years.

At the trial the defense conceded that no consideration was given for the conveyance herein sought to be declared in fraud of creditors, except that the Church cancelled the aforementioned subscription. In other words, there is no evidence that the defendant Church expended any money for the reconstruction of its house of worship or the building of additions thereto, or that anyone else promised to make a contribution for the same purpose and in reliance thereon.

The defense further admitted at the trial that in March, 1932, Marwick informed the defendant Church that he would not be able to perform the obligation he had assumed in said Declaration of Trust, and that because of his age and the fact that his money was exhausted he would be unable to make good his pledge; that he thereupon offered to give the Church a deed absolute to the property in question; also that at the same time he informed the defendant Church that he had other obligations to which said property might be subjected if the Church did not enforce its rights thereto; but that he did not disclose the nature of such other obligations; and that under these circumstances the Church accepted the deed in question.

In addition, by plaintiff's Exhibit 3, (being a photostatic copy of a letter written to said grantor by one of the Church's attorneys on the same day that said Declaration of Trust was recorded) the trustees of the Church notified said grantor: "They (the trustees) do [20] not like to take the property and are doing so solely because they believe you wish the church to have it and because their taking it will prevent it going into the hands of undeserving creditors \* \* \*"

Thus it appears that the defendant Church accepted the conveyance of the property in question with the knowledge of the fact that Marwick was then indebted to certain creditors and that he was unable to pay such debts, and that by accepting said conveyance the Church would aid in preventing these creditors from collecting what was owing to them.

It is equally clear that the cancellation of Marwick's subscription of \$25,000 by the acceptance of the deed in March, 1932, did not constitute a consideration for such conveyance, since that pledge was not binding upon Marwick, the Church having expended no money in reliance thereon, and since no other binding pledge was made in reliance upon the same. Nor can there be any doubt that Marwick was insolvent when the said conveyance was made.

While in their answers both defendants have pleaded that each count was barred by the provisions of Sections 318 and 319 and also by the provisions of Subdivision 4 of Section 338 of the Cali-

for California Code of Civil Procedure, the brief filed on behalf of the defense indicates that this contention has been partially abandoned, that is to say, that only Section 338, Subdivision 4 is now claimed to be applicable. As to the latter defense, the evidence shows without contradiction that the judgment creditor Mrs. Scheinman had no knowledge of the facts constituting the fraud until the year 1935. The recording of the conveyance in 1932 did not disclose that the same was without consideration, nor that Marwick was insolvent, nor [21] any of the other elements necessary to establish that the *the* transaction was fraudulent. Accordingly, the statute of limitations did not start to run until 1935.

Bankruptcy proceedings having been instituted on July 10, 1936, the time within which the trustee might commence this suit was extended to two years after the closing of the estate in bankruptcy. See *Hansen v. California Bank*, 61 Pacific (2d) 794, 803, and cases therein cited. The defense of the bar of the statute of limitations is, therefore, without merit.

There remains to be considered the question whether the Church is entitled to be reimbursed for the monies advanced in payment of taxes. As pointed out in the case of *Lynch v Burt*, 132 Fed, 417, 432: "That he who seeks equity must do equity is a controlling principle or maxim of universal application in awarding equitable remedies. Following it, adverse equities growing out of or closely connected with the subject matter of the



suit are protected by giving to a party the relief to which he is entitled only on condition that he accords to his adversary the corresponding right to which he also is entitled. This principle has a recognized application in suits by creditors to avoid or quiet title against fraudulent conveyances or transfers of a debtor's property, where, after the conveyance or transfer, taxes are paid or encumbrances discharged under circumstances which give rise to an equity equal or superior to that of creditors. If the grantee has been a conscious participant in the fraud, he is not, as against creditors, entitled to reimbursement for such expenditures. [22] (citing cases) \* \* \* But if the grantee has not been a conscious participant in the fraud, he is entitled to reimbursement to be provided for in the decree. (citing cases)''

In *Blank v. Aronson*, 187 Fed. 241, where one of the questions involved was whether a fraudulent grantee was entitled to payment for improvements made by him, in the event of a decree setting aside the fraudulent conveyance, the court said (page 246): "The controlling fact in determining whether this should be done is whether the improvements were made by him in good faith, believing himself to be the real owner, or whether they were made by him in bad faith, in pursuance of a fraudulent scheme to circumvent the owner."

We are satisfied that the defendant Church believed itself to be the real owner of the property in question, and paid the taxes thereon in good

faith. Furthermore, it is not disputed that the property in question consisted of an unimproved parcel of land and that the Church derived no benefit therefrom. Hence the Church should be reimbursed in the amount of the taxes paid on this property. The latter right to relief can be adequately safe-guarded by making such sum a lien against said property.

Accordingly we hold that plaintiff is entitled to a decree as prayed for, subject to the equitable relief in favor of the Church as herein mentioned.

[Endorsed]: Filed Nov. 3, 1939. [23]

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At a stated term, to wit: The September Term, A. D. 1939 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 3rd day of November in the year of our Lord one thousand nine hundred and thirty-nine.

Present:

The Honorable: H. A. Hollzer, District Judge.

[Title of Cause.]

For the reasons set forth in the Memorandum of Conclusions this day filed, it is ordered that counsel for plaintiff prepare and serve findings and decree in conformity with said memorandum. [24]

[Title of District Court and Cause.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This cause came on regularly to be tried on the 20th day of June, 1939, before the above entitled Court, the Hon. Harry Hollzer, Judge presiding; the plaintiff, M. L. Rabbitt, being personally present and represented by his counsel, Edward Gallaudet, Hubert Laugharn and Sampson Miller, Edward Gallaudet, of counsel; the defendant, First Presbyterian Church of Santa Barbara, California, a religious corporation, being represented by its counsel, Schauer, Ryon & McMahan, Robert W. McIntyre of counsel; and the defendant, James Marwick having appeared by his counsel, Stick & Moerdyke, and the said counsel for the said defendant James Marwick having advised the Court that defendant Marwick desired no relief herein and sought to be excused, and the said Marwick and his said counsel having thereupon been excused and having taken no part in the said trial; and the said cause having been tried on the said 20th day of June, 1939 and having been continued to June 21, 1939, upon which said date the said trial was completed; and oral and documentary evidence having been introduced; and both parties having rested; and the cause having been submitted to the Court for its decision; and the Court having [25] made its Memorandum of Conclusions and Minute Order directing that plaintiff recover judgment as prayed for subject to equitable relief in favor of defendant,



First Presbyterian Church of Santa Barbara, California, as hereinafter more particularly stated, Now, Therefore, the Court hereby makes its findings of fact and conclusions of law as follows, to-wit:

Findings of Fact

I.

The allegations in paragraph I of plaintiff's Bill in Equity, not having been controverted, are found to be true.

II.

Each and every allegation contained in paragraph II of plaintiff's Bill in Equity is true.

III.

On and prior to March 26, 1932 defendant, James Marwick, was the owner of the real property described in plaintiff's Bill in Equity and hereinafter referred to as the said real property. On or about the said March 26, 1932 the said James Marwick made, executed and delivered to defendant, First Presbyterian Church of Santa Barbara, California, a deed to the said real property, a true and correct copy of which said deed is contained in the Answer of First Presbyterian Church of Santa Barbara, California, and described therein as Exhibit B.

IV.

At the time of the execution of the said deed, the said Marwick was insolvent and unable to pay his debts and defendant, First Presbyterian Church of Santa Barbara, California, had reason to believe that the said Marwick was insolvent. The said deed

was made and given voluntarily and without a valuable or any consideration and the said Marwick received no consideration [26] therefor from defendant, First Presbyterian Church of Santa Barbara, California.

V.

The said deed was made and given by the bankrupt and received by the First Presbyterian Church of Santa Barbara, California, with intent to hinder, delay and defraud the creditors of said Marwick.

VI.

It is not true, as alleged in paragraph II of plaintiff's Bill in Equity that defendant, First Presbyterian Church of Santa Barbara, California, has collected rents or profits from the said property.

VII.

The Court finds that defendant, First Presbyterian Church of Santa Barbara, California, has since the execution of the said deed, paid various amounts of money as taxes on the said real property, and that by virtue of said payments defendant, First Presbyterian Church of Santa Barbara, California, has become entitled to a lien on the said real property for the moneys so advanced, without interest.

VIII.

Except as the facts are otherwise herein above found, all of the allegations of plaintiff's Bill in Equity are true and all of the admissions, denials

and allegations of the answer of First Presbyterian Church of Santa Barbara, California relating to the said allegations, are untrue.

### IX.

The first affirmative defense of defendant, First Presbyterian Church of Santa Barbara, California is untrue and the Court finds that plaintiff's cause of action is not barred by the provisions of subdivision 4 of Section 338 or by the provisions of Section 318 or 319 of the Code of Civil Procedure of [27] the State of California.

### X.

The allegations of the second affirmative defense of defendant, First Presbyterian Church of Santa Barbara, California, are untrue and the Court finds that said defendant has not been in adverse possession of the said property as alleged in said affirmative defense.

### XI.

The Court finds that the counterclaim of defendant, First Presbyterian Church of Santa Barbara, California, which alleges that said defendant paid taxes and assessments levied against the said property in the sum of \$392.77 is true except that the Court does not find as to the exact amounts so paid because of lack of evidence thereon and finds that the amounts which may have been paid constitute a lien on the said property in favor of the said defendant.



## Conclusions of Law

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

## I.

The deed described in the foregoing Findings of Fact was and is fraudulent and void as to plaintiff. Plaintiff is the owner and holder of the real property described in plaintiff's Bill in Equity and entitled to the possession thereof as an asset of the bankrupt estate of James Marwick and none of the defendants herein have any right, title, claim or interest therein or thereto except that defendant, First Presbyterian Church of Santa Barbara, California, is entitled to a lien on the said real property for the amount of taxes which it has actually advanced thereon from and after March 26, 1932.

Let judgment be entered accordingly. [28]

Dated: December 23, 1939.

H. A. HOLLZER

Judge of the United States  
District Court

[Endorsed]: Filed Dec. 26, 1939. [29]

In the District Court of the United States  
Southern District of California  
Central Division

No. 1428-H Equity

M. L. RABBITT, as Trustee in Bankruptcy of the  
Bankrupt Estate of James Marwick,  
Plaintiff,

vs.

FIRST PRESBYTERIAN CHURCH OF SANTA  
BARBARA, CALIFORNIA, a religious corporation, and JAMES MARWICK,  
Defendants.

JUDGMENT

This cause came on regularly to be tried on the 20th day of June, 1939, before the above entitled Court, the Hon. Harry Hollzer, Judge presiding; the plaintiff, M. L. Rabbitt, being personally present and represented by his counsel, Edward Gallaudet, Hubert Laugharn and Sampson Miller, Edward Gallaudet of counsel; the defendant, First Presbyterian Church of Santa Barbara, California, a religious corporation, being represented by its counsel Schauer, Ryon & McMahon, Robert W. McIntyre of counsel; and the defendant, James Marwick having appeared by his counsel, Stick & Moerdyke, and the said counsel for the said defendant James Warwick having advised the Court that defendant Warwick desired no relief herein and sought to be excused, and the said Marwick

and his said counsel having thereupon been excused and having taken no part in the said trial; and the said cause having been tried on the said 20th day of June, 1939 and having been continued to June 21, 1939, upon which said date the said trial was completed; and oral and documentary evidence having been introduced; and both parties having rested; and the cause having been submitted to the Court for its decision; and the Court having [30] made its Memorandum of Conclusions and Minute Order directing that plaintiff recover judgment as prayed for subject to equitable relief in favor of defendant, First Presbyterian Church of Santa Barbara, California, as hereinafter more particularly stated; and the Court having made its Findings of Fact and Conclusions of Law, Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed as follows, to-wit:

1. M. L. Rabbitt, the plaintiff herein, as Trustee in bankruptcy of the bankrupt estate of James Marwick, being number 28189-S in the records and files of the above entitled court, is the owner of and is entitled to the immediate possession of and is entitled to sell, as an asset of the said bankrupt estate, that certain real property in the County of Santa Barbara, State of California, described as follows:

Beginning at the southeast corner of Lot 61, Santa Barbara Estates, as shown in Book 15, at



pages 51 to 56 of Maps, records of Santa Barbara County; thence south  $82^{\circ}25'$  west, 518.23 feet to a point on the easterly line of a road known as Cuervo Avenue, also known as Collado Avenue; thence easterly and northerly along said Cuervo Avenue, the following courses and distances: on a curve concave to the northwest, said curve having a delta of  $25^{\circ}25'35''$ , a radius of 63.67 feet, along the arc of said curve 28.26 feet to the end of curve; thence on a curve concave to the southeast, said curve having a delta of  $48^{\circ}43'30''$  and radius of 12.85 feet, along arc of said curve 10.93 feet to the end of curve; thence on a curve concave to the east, said curve having a delta of  $15^{\circ}00'$ , radius of 352.25 feet, along the arc of said curve 92.22 feet to the end of curve; thence along a curve concave to the west, said curve having a delta of  $40^{\circ}30'$ , radius of 136.35 feet, along the arc of said curve 96.38 feet to the end of curve; thence on a curve concave to east, said curve having [31] a delta of  $40^{\circ}00'$ , radius 149.20 feet, along the arc of said curve 104.16 feet to the end of curve; thence on a curve concave to the northeast, said curve having a delta of  $72^{\circ}00'$ , radius of 89.58 feet, along the arc of said curve 112.57 feet to the end of curve; thence along a curve concave to the south, said curve having a delta of  $31^{\circ}30'$ , radius 303.22 feet; thence along the arc of said curve 166.70 feet to the end of the curve; thence along a curve concave to north, said curve having a delta of  $53^{\circ}45'30''$ , radius 65.76 feet, along the arc of said curve 61.70

feet to end of curve, thence north  $61^{\circ}44'30''$  east 197.56 feet to a point on the easterly line of Lot 67 of Hope Ranch Park Subdivision, as shown on the Map recorded in Book 2, at page 24, of Maps and Surveys, in the office of the County Recorder of said County; thence continuing along said course north  $61^{\circ}44'30''$  east 145.51 feet to a point; thence north  $32^{\circ}00'$  west 241.86 feet to a point on the easterly line of said Lot 67 as shown on said map recorded in Book 2, at page 24, of Maps and Surveys; thence along the easterly line of Lots 67 and 69, north 100.00 feet to the point of beginning. Being a part of Lots 67, 66 and 69 of Hope Ranch Park Subdivision according to Map No. 1, recorded in Book 2, at page 24, of Maps and Surveys, in the office of the County Recorder of said County; and part of Lots 3 and 4, Subdivision of The Estate of Thos. Hope, deceased, as per Map filed in the Superior Court for Santa Barbara County in case No. 1021, in the Matter of the Partition of the Estate of Thos. Hope, deceased.

2. Defendant, James Marwick has no right, title, claim or interest in or to the said real property.

3. Defendant, First Presbyterian Church of Santa Barbara, California, has no right, title, claim or interest in or to the said real property or any part thereof and that certain document dated November 28, 1927 purporting to create a lien on the [32] said real property in favor of said First Presbyterian Church of Santa Barbara, a corporation,

is void and of no force and effect as to the plaintiff, and that certain document dated March 26, 1932 purporting to grant the said real property from James Marwick and Alice Marwick to defendant First Presbyterian Church of Santa Barbara, California, is void and of no force and effect as to the plaintiff.

4. Defendant, First Presbyterian Church of Santa Barbara, California, is adjudged to have a lien on the said real property in the amount of taxes actually paid by said defendant to the County of Santa Barbara on the said real property since March 26, 1932, the amount of said lien to be proved by said defendant, First Presbyterian Church of Santa Barbara, California, in the said bankruptcy proceeding of which plaintiff is Trustee, and plaintiff shall be entitled to pass a title to the said property free and clear of the lien of the said First Presbyterian Church of Santa Barbara, California, upon paying to the said First Presbyterian Church of Santa Barbara, California, the amount of its said lien.

5. Plaintiff shall have and recover his costs from the defendants herein which are hereby taxed in the amount of \$32.15 Dollars.

Done at Los Angeles, California in the above judicial district this 23 day of December, 1939.

H. A. HOLLZER

Judge of the United States  
District Court



Judgment entered Dec 26 1939

Docketed Dec 26 1939

Book C. O. 2 Page 425

R. S. ZIMMERMAN,

Clerk,

By L. WAYNE THOMAS,

Deputy

[Endorsed]: Filed Dec. 26, 1939. [33]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that the above named defendant, First Presbyterian Church of Santa Barbara, California, a religious corporation, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment of the above entitled Court in the above entitled action entered in said action on the 26th day of December, 1939.

Dated this 20th day of March, 1940.

SCHAUER, RYON & McMAHON

ROBERT W. McINTYRE

Attorneys for said Appealing  
Defendant.

Address:

26 E. Carrillo Street,  
Santa Barbara, California.

Mailed to: Daily & Gallaudet, Attys. for Plf. 110 West Broadway, Glendale, Calif., and: Stick & Moerdyke, Attys. 914 Washington Bldg., Los Angeles, L. A. for deft. Marwick

[Endorsed]: Filed Mar 20 1940 [34]

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON ON  
APPEAL BY APPELLANT, FIRST PRES-  
BYTERIAN CHURCH OF SANTA BAR-  
BARA, CALIFORNIA

Said appellant hereby states that it intends to rely on its appeal from the above entitled Court to the Circuit Court of Appeals for the Ninth Circuit, upon the following points and propositions, to-wit:

I. That the judgment of the Court is erroneous for the reason that the evidence shows, conclusively and without conflict, that there was adequate consideration for the transfer of the property in question from defendant Marwick to this appealing defendant, and, therefore, said transfer is not void and may not be set aside.

II. That the judgment of the Court is erroneous for the reason that, regardless of the question of consideration, the evidence shows, conclusively and without conflict, that the transfer in question was made prior to the incurrence of the obligations of defendant Marwick and that said creditors were not existing [37] creditors at the date of said transfer.

III. That irrespective of the questions of adequacy of consideration and the necessity of consideration, the judgment of the Court is erroneous for the reason that the evidence shows, conclusively and without conflict, that the creditors of James

Marwick had constructive notice of said transfer more than three years prior to the adjudication of bankruptcy of said James Marwick, and, therefore, said action was barred by the statute of limitations.

Dated this 29th day of February, 1940.

SCHAUER, RYON & McMAHON  
ROBERT W. McINTYRE

Attorneys for Appellant.

Receipt of a copy of the foregoing statement of points relied upon on appeal is hereby admitted this ..... day of March 1940

.....  
Attorneys for plaintiff.

State of California,  
County of Santa Barbara—ss.

Marceline Cronan, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Santa Barbara; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's residence business address is 26 East Carrillo Street, Santa Barbara, California. That on the 26th day of March, A. D., 1940 affiant served the within Statement of Points Relied Upon on Appeal by Appellant, First Presbyterian Church of Santa Barbara, California, on the Attorneys for Plaintiff in said action, by placing a true copy thereof in an envelope addressed to said Attorneys at the resi-



dence business address of said Attorneys, as follows: Edward Gallaudet, Hubert Laugharn and Sampson Miller, c/o Edward Gallaudet, 110 West Broadway, Glendale, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Santa Barbara, California. That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

MARCELINE CRONAN

Subscribed and sworn to before me this 26th day of March, 1940.

[Seal] MABEL REYNOLDS  
Notary Public in and for said County and State.

[39]

[Endorsed]: Filed Mar. 27, 1940. [38]

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[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated by and between the plaintiff above named and defendant First Presbyterian Church of Santa Barbara by and through their respective attorneys, in connection with the appeal which has heretofore been taken by said defendant, and more particularly in connection with the record on appeal, as follows, to-wit:

The parties entered into certain stipulations and agreements at the time of trial of the above entitled action and immediately subsequent thereto, which said stipulations and agreements do not appear in the reporter's transcript, and the parties now agree that the said stipulations and agreements were as hereinafter set forth and shall be deemed for all purposes to be a part of the record on appeal, and are as follows, to-wit:

1. Each and every allegation of paragraph II of Plaintiff's Bill in Equity is true and the allegations thereof are admitted by the defendant and appellant, with this exception: The claim of Marie Scheinman referred to in the said paragraph II arose on December 1, 1927 as a result of the execution of the promissory note referred to therein, and the claim of the Assets Corporation arose on August 14, 1928. No evidence was offered [40] and no stipulation entered into disclosing that either of the said claims arose prior to the said dates.

2. The two creditors referred to in the said paragraph II of plaintiff's Bill in Equity properly filed their claims in the bankruptcy proceeding referred to in paragraph I of plaintiff's Bill in Equity and the said claims were not paid and there has at no time been sufficient assets in the said bankrupt estate to pay the same.

Dated: June 11th, 1940.

SCHAUER, RYON & McMAHON  
ROBERT W. McINTYRE

Attorneys for defendant and  
appellant First Presbyte-  
rian Church of Santa Bar-  
bara, California

SAMPSON H. MILLER  
HUBERT F. LAUGHREN  
EDWARD GALLAUDET

Attorneys for plaintiff and  
respondent

[Endorsed]: Filed Jun 12 1940 [41]

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

The above named appealing defendant, First Presbyterian Church of Santa Barbara, California, a religious corporation, hereby designates the portions of the record, proceedings and evidence in the above entitled action to be included and contained in the record on the appeal of said defendant to the Circuit Court of Appeals for the Ninth Circuit, as follows, to-wit:



## I. Pleadings:

- A. The Bill in Equity of the above named plaintiff.
- B. The answer of First Presbyterian Church of Santa Barbara, California, Exhibit "A" of said answer being defendant's Exhibit "B" in evidence, and Exhibit "B" of said answer being plaintiff's Exhibit "2" in evidence. [42]

## II. Evidence:

- A. Reporter's transcript of testimony on trial of the above entitled action, said transcript being on file herein in duplicate.
- B. The original of defendant's Exhibit "B" in evidence, the same being a certain declaration of trust by James Marwick dated November 28, 1927, including recordation certificate.
- C. That certain original Deed from James Marwick and Alice Marwick, his wife, to First Presbyterian Church of Santa Barbara, California, dated March 26, 1932, and introduced in evidence as plaintiff's Exhibit "2", including recordation certificate.

## III. Judgment, etc.:

- A. Memorandum opinion of the Court.
- B. Findings of Fact and Conclusions of Law of the Court.
- C. Judgment of the Court.
- D. Order for entry of Judgment.

IV. Record of Proceedings on Appeal:

A. Notice of appeal.

B. This specification of record on appeal.

C. Statement of appellant of points on appeal.

Dated this 22nd day of March, 1940.

SCHAUER, RYON & McMAHON

ROBERT W. McINTYRE

Attorneys for Appellant.

State of California,

County of Santa Barbara—ss.

Marceline Cronan, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Santa Barbara; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 26 East Carrillo Street, Santa Barbara, California. That on the 26th day of March, A. D., 1940 affiant served the within Designation of Contents of Record on Appeal on the Attorneys for Plaintiff in said action, by placing a true copy thereof in an envelope addressed to said Attorneys at the business address of said Attorneys, as follows: Edward Gallaudet, Hubert Laugharn and Sampson Miller, c/o Edward Gallaudet, 110 West Broadway, Glendale, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Santa Barbara, California. That there is delivery service by United States mail at the place so addressed and there is

a regular communication by mail between the place of mailing and the place so addressed.

MARCELINE CRONAN

Subscribed and sworn to before me this 26th day of March, 1940.

[Seal]

MABEL REYNOLDS

Notary Public in and for said County and State.

[44]

[Endorsed]: Filed Mar. 27, 1940. [43]

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[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated that the above named defendant and appellant, First Presbyterian Church of Santa Barbara, California, may have to and including the 25th day of June, 1940, within which to file its Transcript on Appeal with the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled action.

It is further stipulated that the Record on Appeal in the above entitled matter shall consist of those documents specified in appellant's Designation of Contents of Record on Appeal and in addition thereto plaintiff's Exhibit No. 3 introduced in evidence in the above entitled action, and in addition thereto the stipulation of facts concerning certain stipulations made at the time of trial which said stipulation is filed herewith, and it is further stipu-



lated that this stipulation shall be in lieu of and supersede respondent's Designation of Contents of Record on Appeal on file herein.

It is further stipulated that where as the above named [45] defendant, James Marwick, appeared at the trial of the above entitled action and disclaimed all interest in the property involved in said action at the time of trial and asked leave of court to withdraw from said proceedings, which leave was granted by the court, therefore, the pleadings of the said James Marwick need not be included in the Record on Appeal herein.

Dated this 1st day of June, 1940.

SCHAUER, RYON & McMAHON,  
ROBERT W. McINTYRE,

Attorneys for defendant and  
appellant First Presbyterian  
Church of Santa Barbara,  
California.

SAMPSON H. MILLER,  
HUBERT F. LAUGHREN,  
EDWARD GALLAUDET,

Attorneys for plaintiff and  
respondent.

[Endorsed]: Filed Jun. 12, 1940. [46]

[Title of District Court and Cause.]

ORDER GRANTING EXTENSION OF TIME  
TO FILE RECORD ON APPEAL

Upon the application of First Presbyterian Church of Santa Barbara, California, defendant named in the above entitled action, and good cause therefor appearing,

It is hereby ordered that time be extended to and including the 25th day of June, 1940, within which said defendant may file its Record on Appeal from the Judgment rendered in that certain action entitled, "In the District Court of the United States, Southern District of California, Central Division, M. L. Rabbitt, as Trustee in Bankruptcy of the Bankrupt Estate of James Marwick, Plaintiff, vs. First Presbyterian Church of Santa Barbara, California, a religious corporation, and James Marwick, Defendants, No. 1428-H".

Dated, May 31, 1940.

ALBERT LEE STEPHENS,  
Circuit Judge. [48]

[Endorsed]: Filed May 31, 1940. [48]

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[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing pages, numbered from 1 to 48, inclusive, contain full, true and

correct copies of Bill in Equity; Answer of First Presbyterian Church of Santa Barbara; Memorandum of Conclusions and Order Nov. 3, 1939; Minute Order Nov. 3, 1939; Judgment; Notice of Appeal; Bond for Costs on Appeal; Statement of Points Relied Upon by Appellant; Stipulation of Facts; Designation of Record on Appeal; Stipulation Extending Time to Docket Appeal; Order re original exhibits; Original Order Extending Time to Docket Appeal, which together with original exhibits and Reporter's Transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to \$7.85, and that said amount has been paid me by the Appellant herein.

Witness my hand and the Seal of the District Court of the United States for the Southern District of California, this 24th day of June, A. D. 1940.

[Seal]

R. S. ZIMMERMAN,

Clerk.

By EDMUND L. SMITH,

Deputy Clerk. [49]



[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Los Angeles, California,

Wednesday, June 21, 1939, 10 A. M.

Mr. Gallaudet: Now, if the court please, in paragraph 4 of our complaint we allege, and the answer admits, that on or about the 30th day of March, 1932, James Marwick, the Bankrupt, caused to be recorded in the office of the County Recorder of Santa Barbara County a deed to the real property which is the subject matter of this action. The answer admits that such a deed was recorded, and sets it up in haec verba, as Exhibit B. I think, from the standpoint of orderly procedure, inasmuch as that deed at least is one of the documents relied upon here, as I understand it from the statement of facts submitted by the defendant, and is the document which the proof seeks to set aside, that it might be offered now for identification so that we may refer to it more expeditiously.

Mr. McIntyre: We have the originals of both documents here, which are set up in the answer.

The Court: They might be marked for identification at this time, and then you can inquire as to the circumstances under which they were executed.

Mr. McIntyre: And if delivery is properly shown they can be forthwith admitted.

Mr. Gallaudet: I think they will go in before the trial is over, counsel. I admit their genuineness, and we will establish delivery. [50]

Mr. McIntyre: They may be marked as exhibits at this time. I think they should be plaintiff's exhibits.

The Court: Mark it Exhibit 1 for identification at this time. Which is the earlier of the two?

Mr. Gallaudet: The earlier of the two is entitled, I believe: Trust Indenture.

Mr. McIntyre: Yes, Declaration of Trust, dated the 28th day of November, 1927.

The Court: What is the date?

Mr. Gallaudet: The document bears date the 28th day of November, 1927, and appears on its face to have been executed before a Notary Public on that date.

The Court: By whom?

Mr. Gallaudet: By James Marwick, one of the defendants in this action. I believe, for the sake of the record, we may perhaps from time to time refer to him as the Bankrupt, to distinguish him from the defendant First Presbyterian Church.

The Court: Very well. The other——?

Mr. Gallaudet: The other document appears to be a deed. I say appears to be, because it is not entitled as such, but it is a document which I think we will refer to as the deed, dated, if the court please, March 26, 1932.

The Court: Purporting to be executed by James Marwick?

Mr. Gallaudet: Purporting to be executed by James Marwick, and in this case, Alice Marwick, his wife. [51]

The Court: To whom?

Mr. Gallaudet: The First Presbyterian Church of Santa Barbara, California, who is admitted here to be the defendant who is now before us.

The Court: Very well, that will be marked Plaintiff's No. 2 for identification.

Mr. McIntyre: I wonder if you would care to stipulate as to the payment of taxes by the Church? We sent a statement to you. We have some, but not all, of the tax receipts.

Mr. Gallaudet: Couldn't we get at it this way: I will make no objection to the use of the tax receipts, and, as to any that are missing, if you will state those were paid in those amounts I will make no objection. I am only interested in knowing when the Church started to pay the taxes.

Mr. McIntyre: I can't be sure whether the Church started paying taxes in 1927 or 1932. One statement received states '27. The statement was that the Church paid from '27, but in searching the tax receipts, we have only been able to find tax receipts from '32, and I think '36 is missing. Perhaps we can stipulate from '32 on.

Mr. Gallaudet: Yes.

Mr. McIntyre: I have them here, minus one year.

Mr. Gallaudet: I have no objection to that.

Mr. McIntyre: I think it is 1936. We start with '32. [52]

Mr. Gallaudet: Would it inconvenience counsel to offer those in evidence? I will make no objection



upon the ground of their not being the best evidence, or anything of that sort.

Mr. McIntyre: Let us offer them for identification at the present time.

The Court: We will mark the series of tax receipts as Defendant's Exhibit A. What years do they cover?

Mr. McIntyre: 1932 to 1937, with the exception of one year. [53]

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FRED H. SCHAUER,

a witness called by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: Will you state your name?

A. Fred H. Schauer.

Direct Examination

Q. By Mr. Gallaudet: Mr. Schauer, you are a member of the present firm of Schauer, Ryan & McMahan? A. I am.

Q. Who are presently attorneys of record for the First Presbyterian Church of Santa Barbara?

A. Yes, with Robert W. McIntyre.

Q. Do you have in mind the document which we have referred to as the Trust Indenture, copy of which is annexed to the answer of defendants, and which appears to have been executed by James Marwick on November 28, 1927?

A. I have it in mind.

Q. You are familiar with the document?

(Testimony of Fred H. Schauer.)

A. Yes, quite so. I have examined it recently.

Q. The document I now have in my hand is a copy of the answer filed by the defendant Church. Referring to the statement contained therein that the instrument is left in the possession of Messrs. Schauer & Ryan, attorneys-at-law,—the gentleman named there is you, I take it? A. Yes. [54]

Q. So that this document, Plaintiff's Exhibit 1 for identification, was, as stated therein, handed to you at that time? A. Yes.

Q. Is that correct?

A. I don't know whether it was handed to me, or mailed to me. I would have to look at the document itself to tell that.

Q. At that time, when you did receive the document, were you attorney, or was your firm attorneys for the First Presbyterian Church of Santa Barbara?

A. I don't recall. When was that document dated,—1927?

Q. The date of the document is November 28, 1927.

A. No, I was not an official, nor was I attorney, except——

Mr. McIntyre: I think the witness has misconstrued your question. Would you mind asking it again?

Mr. Gallaudet: Will you read it, Mr. Reporter?  
(Question read by the reporter.)

(Testimony of Fred H. Schauer.)

A. I would have to see the document itself.

The Court: What is that exhibit?

Mr. Gallaudet: It is Exhibit 1 for identification and is now being handed the witness.

A. It is pretty hard to answer that. May I explain?

Q. Certainly. [55]

A. Mr. Marwick had employed me in another matter, and suggested this instrument be prepared as security for his pledge. I took it up with the then chairman of the Board of Trustees, or someone connected with the Board, and they authorized me to accept such a document and hold it, so that I was acting for them in that respect.

Q. Pursuant to that authorization from the Church, you thereafter did receive the document, and did hold it, is that correct, Mr. Schauer?

A. Yes, I did.

Q. Are you a member of the Board of Trustees of the Church?           A. I beg your pardon?

Q. Are you a member of the Board of Trustees of the Church?           A. No, I am not.

Q. Were you ever a member of the Board of Trustees of the Church?

A. Yes, I was, but I think that was in the early '20s.

Q. In the early '20s?           A. Yes.

Q. How long a time did you continue to be such a member, Mr. Schauer?



(Testimony of Fred H. Schauer.)

A. I think I was on two or three times, and I believe I was on for one term in the '30s, but I don't remember the date. [56]

The Court: In other words, you were not a member of the Board of Trustees at the time this instrument was left with you?

A. No, I was not a member. I checked that yesterday. I was not a member in 1927.

Q. By Mr. Gallaudet: Referring to the document that you have in your possession, Plaintiff's Exhibit No. 1 for identification, and on the reverse side of the cover, Mr. Schauer, you will observe the recording date. What is that date?

A. March 24, 1934.

Q. Were you a member of the Board of Trustees at that time?      A. I don't know.

Q. Could you tell me who caused that document, Plaintiff's Exhibit No. 1 for identification, to be recorded?

A. I did, at the request of Mr. Marwick, and of the chairman of the Board of Trustees—whoever was then acting.

Q. You don't know whether you were then a member of the Board of Trustees?

A. No, I do not recall that.

Q. At that time would you say you were representing the Church in connection with this transaction?

A. Yes; that is, I was authorized by them.

(Testimony of Fred H. Schauer.)

Q. I show you a document, Mr. Schauer, which appears to be a photostatic copy of a letter, and ask you if you have [57] any recollection of the original of that document.

A. That is not my signature, but it looks like the handwriting of my secretary. I have no independent recollection of it, but I have no doubt that it was sent from my office, and at my dictation.

Mr. Gallaudet: I ask that this letter be marked Plaintiff's Exhibit No. 3 for identification.

The Court: It will be so marked.

Mr. Gallaudet: I now, counsel, offer the document as an exhibit in evidence.

Mr. McIntyre: I have the copy here, and it corresponds to the copy in our files, so it may go in.

Mr. Gallaudet: Very well.

The Court: May I see the instrument?

Mr. Gallaudet: I was a little hesitant in offering it, because I was prepared to prove the making of the photostatic copy, and the loss of the original.

The Court: The instrument then will go in evidence as Exhibit 3. May it be deemed to have been read into the record, without taking up the time now?

Mr. Gallaudet: So stipulated.

Mr. McIntyre: So stipulated.

(Testimony of Fred H. Schauer.)

PLAINTIFF'S EXHIBIT NO. 3

Fred H. Schauer

Harrison Ryon

Julien F. Goux

Leo T. McMahon

Cable Address

Schaueryon

Telephone 7109

Schauer, Ryon & Goux  
Attorneys-at-Law  
26 East Carrillo Street  
Santa Barbara, California

March 24, 1932.

Mr. James Marwick,  
8590 Hollywood Boulevard,  
Hollywood, California.

Dear Mr. Marwick:

The Declaration of Trust which we talked about the other day was recorded today and now I am sending you the deed for the signatures of yourself and Mrs. Marwick as we discussed this afternoon. I think this will be the best way of handling the matter.

The Trustees of the church feel very grateful towards you. They do not like to take the property and are doing so solely because they believe you wish the church to have it and because their taking it will prevent it going into the hands of undeserving creditors.

This deed will have to be acknowledged before a Notary Public.



(Testimony of Fred H. Schauer.)

With best regards and again thanking you, I remain

Most cordially yours,

FRED H. SCHAUER

FHS:MR

Encl.

[Endorsed]: Pltf's Exhibit No. 3. Filed June 21, 1939. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

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Q. By Mr. Gallaudet: Now, Mr. Schauer, you have observed that Plaintiff's Exhibit No. 1 for identification was recorded some years after the date it bears. Do you have any independent recollection as to the date upon which [58] the document was delivered to you? That is, it would be presumably some time between the date of its execution or making, and the date of its recordation.

A. This instrument that I have in my hand was delivered to me immediately upon its execution, in my office, by Mr. Marwick. That would be the 28th day of November, 1927.

The Court: That is Exhibit No. 1?

A. Exhibit No. 1.

Q. By Mr. Gallaudet: And held by you in your possession until the date it was recorded?

A. Yes.

Q. Now, Mr. Schauer, as I understand it, there was no consideration paid by the First Presbyterian

(Testimony of Fred H. Schauer.)

Church of Santa Barbara to James Marwick, or to anyone else, for the deed, Plaintiff's Exhibit No. 2 for identification, other than the considerations referred to in the Trust Indenture, to-wit, Plaintiff's Exhibit 1 for identification?

Mr. McIntyre: I am afraid I am going to have to interpose an objection to that question in the form it is put. Of course, it calls for the opinion and conclusion of the witness.

The Court: The objection is well taken.

Mr. McIntyre: My only reason for interposing the objection is that it is a blanket question, covering a number of transactions.

Q. By Mr. Gallaudet: Mr. Schauer, do you know whether [59] or not the Church paid any money to Mr. Marwick in exchange for the deed, being Plaintiff's Exhibit No. 2 for identification? I think perhaps you can answer that yes or no, if you know.

A. Not through my hands, no.

The Court: Would it be correct to say—I am interrupting here in the light of the fact that a pre-trial memorandum was filed by defendant's counsel—that the consideration which the defendants claim was given for this conveyance is as outlined in the pre-trial brief?

Mr. McIntyre: That is correct. Our consideration, we claim, is set forth in that.

The Court: That would cause the inference, which is quite obvious, that the Board paid no money for this conveyance, but, instead, cancelled

(Testimony of Fred H. Schauer.)

Mr. Marwick's indebtedness to the Church by virtue of some one or more prior pledges.

Mr. McIntyre: That is our position.

Mr. Gallaudet: I gather, from a fair reading of the answer, and the statement of facts, that it was more or less admitted that no cash consideration passed. The deed itself, however, recites other good and valuable considerations, and I am only now trying to negative any possible inference in that connection.

Mr. McIntyre: I think we can stipulate that the Board paid no cash for the deed. I don't mean by that stipulation to go any further than that, however: That no one paid [60] cash, or no cash was paid by the Church; that the Church paid Mr. Marwick no cash for that deed.

Mr. Gallaudet: May it be further stipulated that no one paid any cash to Mr. Marwick on behalf of the Church?

Mr. McIntyre: I think we can stipulate that Mr. Marwick personally received no cash for either of the instruments.

Mr. Gallaudet: That is all I have in mind.

Mr. McIntyre: All right.

Mr. Gallaudet: I assume we may take it that the word "cash" includes in this connection cash or——

Mr. McIntyre: ——or property.

Mr. Gallaudet: ——or property going to him.

The Court: Perhaps I should add to the statement I just made, to which I understand counsel



(Testimony of Fred H. Schauer.)

for the defendants has stipulated, that the pledge or pledges which the Church cancelled as the consideration for this conveyance were made in conjunction with, or as a part of, an undertaking whereby other pledges were obtained by the Church.

Mr. McIntyre: We are prepared to establish that.

The Court: I am merely stating that as the position of the defendants.

Mr. Gallaudet: I understand that to be their position. The plaintiff now offers into evidence, if the court please, Plaintiff's Exhibit 2 for identification, being the deed in question, and which we offer pursuant to our allegation in paragraph 4 that a deed was executed and delivered. [61]

The Court: It will now be admitted in evidence as Plaintiff's Exhibit 2. I think we marked the photostat of the letter as Exhibit 3.

#### PLAINTIFF'S EXHIBIT No. 2

This indenture, made this 26th day of March, 1932, by and between James Marwick and Alice Marwick, his wife, of Los Angeles County, California, parties of the first part, and First Presbyterian Church of Santa Barbara, California, a religious corporation, organized and existing under and by virtue of the laws of the State of California, party of the second part,

(Testimony of Fred H. Schauer.)

Witnesseth:

That whereas said James Marwick, one of the parties of the first part, heretofore made a pledge to the building and reconstruction fund of the said party of the second part, which pledge was secured by an instrument dated November 28, 1927, recorded in Book 262, Page 267 Official Records of Santa Barbara County, California, imposing a lien on the real property therein and hereinafter described, wherein and whereby said James Marwick agreed that in the event of his death prior to paying said sum of \$25,000.00 to said party of the second part or in the event of his failure to pay the same within ten years from the 28th day of November, 1927, the said party of the second part would take record title to said property and be the sole owner thereof, and

Whereas the party of the second part is at this time willing to accept the fee title to said property and in consideration thereof release said James Marwick from all his obligations to said party of the second part,

Now therefore this indenture witnesseth:

That the said parties of the first part, for and in consideration of the sum of Ten Dollars to them in hand paid, and other valuable considerations to them passing from the party of the second part, including a complete release from all obligations of said James Marwick to said party of the second

part, do by these presents grant, bargain, sell, convey and confirm unto said party of the second part, its successors and assigns forever, the following described land in the County of Santa Barbara, State of California, described as follows:

Beginning at the southeast corner of Lot 61, Santa Barbara Estates, as shown in Book 15, at pages 51 to 56, of Maps, records of Santa Barbara County; thence south  $82^{\circ}25'$  west, 518.23 feet to a point on the easterly line of a road known as Cuervo Avenue, also known as Collado Avenue; thence easterly and northerly along said Cuervo Avenue, the following courses and distances: on a curve concave to the northwest, said curve having a delta of  $25^{\circ}25'35''$ , a radius of 63.67 feet, along the arc of said curve 28.26 feet to the end of curve; thence on a curve concave to the southeast, said curve having a delta of  $48^{\circ}43'30''$  and radius of 12.85 feet, along arc of said curve 10.93 feet to the end of curve; thence on a curve concave to the east, said curve having a delta of  $15^{\circ}00'$ , radius of 352.25 feet, along the arc of said curve 92.22 feet to the end of curve; thence along a curve concave to the west, said curve having a delta of  $40^{\circ}30'$ , radius of 136.35 feet, along the arc of said curve 96.38 feet to the end of curve; thence on a curve concave to east, said curve having a delta of  $40^{\circ}00'$ , radius 149.20 feet, along the arc of said curve 104.16 feet to the end of curve; thence on a curve concave to the northeast, said curve having a delta of  $72^{\circ}00'$ , radius of 89.58 feet, along the arc of said curve



112.57 feet to the end of curve; thence along a curve concave to the south, said curve having a delta of  $31^{\circ}30'$ , radius 303.22 feet; thence along the arc of said curve 166.70 feet to the end of the curve; thence along a curve concave to north, said curve having a delta of  $53^{\circ}45'30''$ , radius 65.76 feet, along the arc of said curve 61.70 feet to end of curve; thence north  $61^{\circ}44'30''$  east 197.56 feet to a point on the easterly line of Lot 67 of Hope Ranch Park Subdivision, as shown on the Map recorded in Book 2, at page 24, of Maps and Surveys, in the office of the County Recorder of said County; thence continuing along said course north  $61^{\circ}44'30''$  east 145.51 feet to a point; thence north  $32^{\circ}00'$  west 241.86 feet to a point on the easterly line of said Lot 67 as shown on said map recorded in Book 2, at page 24, of Maps and Surveys; thence along the easterly line of Lots 67 and 69, north 100.00 feet to the point of beginning. Being a part of Lots 67, 66 and 69 of Hope Ranch Park Subdivision according to Map No. 1, recorded in Book 2, at page 24, of Maps and Surveys, in the office of the County Recorder of said County; and part of Lots 3 and 4, Subdivision of The Estate of Thos. Hope, deceased, as per Map filed in the Superior Court for Santa Barbara County in Case No. 1021, in the Matter of the Partition of the Estate of Thos. Hope, deceased.

Together with all the tenements hereditaments and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold all and singular the above described premises, together with the appurtenances, unto the said party of the second part, its successors and assigns, forever.

The said party of the second part, for and in consideration of the execution of this deed and the delivery thereof, hereby releases, exonerates and forever discharges said James Marwick from any and all obligations and liabilities arising out of said pledge of \$25,000.00 for said building and reconstruction fund.

In witness whereof, the parties of the first part have hereunto set their hands and the party of the second part has caused its name to be hereunto subscribed by its President and Secretary thereunto duly authorized by resolution of its board of trustees, the day and year first hereinabove written.

ALICE MARWICK

JAMES MARWICK

Parties of the first part.

[Seal] FIRST PRESBYTERIAN CHURCH  
OF SANTA BARBARA

By EUGENE H. LYMAN

President Board of Trustees

By H. M. GENTRY

Acting Secretary Board of Trustees

State of California,  
County of Los Angeles—ss.

On this 26 day of March, A. D., 1932, before me, the undersigned a Notary Public in and for said

County and State, personally appeared James Marwick and Alice Marwick, known to me, to be the persons whose names are subscribed to the within Instrument, and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]                      O. L. MONTGOMERY  
Notary Public in and for said County and State.  
My Commission Expires Sep. 23, 1933.

State of California,  
County of Santa Barbara—ss.

On this 29th day of March in the year one thousand nine hundred and thirty-two, before me, Mabel Reynolds, a Notary Public in and for the said County of Santa Barbara, State of California, residing therein, duly commissioned and sworn, personally appeared Eugene H. Lyman and H. M. Gentry, known to me to be the President and acting Secretary, respectively of the corporation described in and that executed the within instrument, and also known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, in the said County of



Santa Barbara, the day and year in this certificate first above written.

[Seal]

MABEL REYNOLDS

Notary Public in and for the said County of Santa Barbara, State of California.

My Commission expires April 4, 1932.

Whereas the pledge of James Marwick of the sum of \$25,000.00 for the building and reconstruction fund of the First Presbyterian Church of Santa Barbara, California, secured by a Declaration of Trust on certain real property near Santa Barbara, California, is unpaid, and

Whereas said James Marwick is willing to deed said property in consideration of a release from said pledge and the board of trustees believe the same to be for the best interests of the church,

Now, therefore, be it resolved, that the said deed be accepted and that in consideration therefor a complete release and discharge be given to said James Marwick of all liabilities and obligations under said pledge, and

Be it further resolved, that the president and secretary of this board be and they are hereby authorized and directed to subscribe the name of the First Presbyterian Church of Santa Barbara to said deed as second party therein.

I hereby certify that the foregoing is a true and correct copy of a Resolution passed and adopted at a meeting of the board of trustees of the First Presbyterian Church of Santa Barbara at a called

meeting thereof held on the 29th day of March, 1932, a quorum being present and voting and that said resolution has not been cancelled, annulled or rescinded and is now of record in the minutes of said board of trustees.

Dated, March 29th, 1932.

H. M. GENTRY

Acting Secretary Board of  
Trustees.

[Endorsed]: Recorded at request of Schauer, Ryon & Goux. Mar. 30, 1932, at 7 min. past 10 o'clock A. M. in Book 259 of Official Records, Page 305. Records of Santa Barbara County, Cal. Yris Covarrubias, County Recorder. By Lucy E. [illegible], Deputy Recorder.

Fee 1.90

[Endorsed]: Pltf's Exhibit No. 2. Filed June 21, 1939. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

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Mr. Gallaudet: I think so, your Honor. Plaintiff now relies upon the statement made in the Statement of Facts, of the defendant, that at the time the deed was delivered—that is on page 2, paragraph 4—as follows:

“In March of 1932”

—which your Honor will observe was the time of recording of both these instruments—

“In March of 1932 the defendant Marwick informed the Church that he would not be able to perform the obligation he had assumed in the deed of trust; that because of his age and the fact that his money was exhausted he would not be able to make good his pledge and then and there offered to give the church a deed absolute to the property here in question. At this time Marwick did inform the Church that he had other obligations to which the property might be subjected if the church did not enforce its rights thereto.”

That is the end of the statement upon which plaintiff relies. I think these matters could be elicited by lengthy questioning of Mr. Schauer.

Mr. McIntyre: You are satisfied with our statement?

Mr. Gallaudet: Yes. [62]

The Court: Then I take it that the defendants admit the truth of the matters just recited?

Mr. McIntyre: Yes.

Mr. Gallaudet: Of course, it is understood that we admit that it is true, as stated therein, that Mr. Marwick informed them of these matters. That is, as the statement states. I think the statement the court made is correct. Plaintiff admits the truth of these documents.

Mr. McIntyre: I might add to that that we have no information as to the nature of the claims or anything of that sort; just that there were claims.



Mr. Gallaudet: Yes, I understand. I have no more questions to ask this witness.

Mr. McIntyre: We will have no cross examination.

Mr. Gallaudet: I would like to call Mrs. Scheinman. [63]

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MARIE SCHEINMAN,

a witness called by and on behalf of the plaintiff,  
having been first duly sworn, testified as follows:

The Clerk: Please state your name.

A. Marie Scheinman.

Direct Examination

Q. By Mr. Gallaudet: Are you the Marie Scheinman named as plaintiff in the action which has been heretofore discussed against James Marwick and others? A. Yes, sir.

Q. Do you now understand that this present action which we are trying here today is an action to set aside a transfer to real property?

A. Yes.

Q. You know that? A. Yes.

Q. When did you first know that James Marwick transferred or deeded the property involved in this action to the First Presbyterian Church of Santa Barbara?

A. I did not know it until my attorney, Mr. Miller, notified me.

(Testimony of Marie Scheinman.)

Q. Your first knowledge then was from Mr. Miller?      A. Yes.

Mr. Gallaudet: Cross-examine, counsel.

The Court: I don't think the witness testified when she [64] got that information.

#### Cross Examination

Q. By Mr. McIntyre: When did you get that information?      A. From Mr. Miller?

Q. Yes, the approximate date—roughly?

A. I really don't remember.

Mr. Gallaudet: I might say that I intend calling Mr. Miller and asking him when he told her.

Q. By Mr. McIntyre: You can't fix even approximately the date? I am not asking you for the exact date.

A. No, I cannot; I am sorry.

Q. You cannot state whether it was after Mr. Marwick's bankruptcy or before?

A. I think it was after. I don't know.

The Court: I can't hear you, madam.

A. I said I did not know. I really don't know when he told me, but I know he told me after; I did not know anything of it until he notified me, and that was after bankruptcy.

Q. By Mr. McIntyre: After bankruptcy?

A. Yes.

Mr. McIntyre: That is all.

Mr. Gallaudet: I will now call Mr. Miller. [65]

SAMPSON H. MILLER,

a witness called by and on behalf of the plaintiff,  
having been first duly sworn, testified as follows:

The Clerk: State your name.

A. Sampson H. Miller.

Direct Examination

Q. By Mr. Gallaudet: Mr. Miller, are you the  
Sampson H. Miller who appears to be an attorney  
of record in the case of Scheinman v. Marwick  
and others?

A. Yes, I was one of the attorneys of record in  
that case.

Q. You were the attorney who took care of the  
matter of obtaining the judgment in question here?

A. That is correct.

Q. Can you state to the court when was the first  
occasion of your ascertaining that James Marwick  
had transferred the property involved in this action  
to the defendant, First Presbyterian Church of  
Santa Barbara?

Mr. McIntyre: I wonder if I might inquire as  
to just where this is going? Perhaps we can stipu-  
late, or perhaps it is immaterial.

Mr. Gallaudet: A question is presented in the  
pleadings, if the court please, as to the Statute of  
Limitations. There is a code section—without ad-  
mitting that it is now binding on the trustee in any  
way, or [66] is a proper defense here,—but there  
is a code section of the State of California indi-  
cating that an action based on fraud must be



(Testimony of Sampson H. Miller.)

brought within three years after discovery of the fraud. The purpose of this line of questioning is to show that as to this creditor no information was had as to this transfer until much less than three years before the bankruptcy proceeding. Of course, the Statute does not run after the filing of the petition, until two years after the closing of the estate. That is the purpose of the evidence.

Mr. McIntyre: That he had no actual knowledge?

Mr. Gallaudet: No actual knowledge.

Mr. McIntyre: That excludes any knowledge that would be imputed to her from the record?

Mr. Gallaudet: Obviously a document that is recorded imputes knowledge. That is another matter.

Mr. McIntyre: What date do you wish to establish as to the acquiring actual knowledge?

Mr. Gallaudet: I expect the evidence to show that it was within a year prior to the filing of the bankruptcy petition.

Mr. McIntyre: It was within the year prior?

Mr. Gallaudet: Yes.

Mr. McIntyre: It conflicts somewhat with Mrs. Scheinman's testimony. She stated it was after.

Mr. Gallaudet: I heard her say that. [67]

Mr. McIntyre: She said he told her afterward. What date do you want to establish?

Q. By Mr. Gallaudet: Can you give the date?

(Testimony of Sampson H. Miller.)

A. Yes, I think I can. As I recall it, subsequent to the rendition of the judgment we had an execution issued some time in October of 1935, against Mr. Marwick, and acting in accordance with instructions in that execution the Marshal of the Municipal Court went up to Mr. Marwick's house and there levied and seized certain personal property—I think stock certificates, and some other documents, perhaps, of various kinds, and brought them into his possession. I inspected those documents at the Marshal's office, and among those documents I found a copy of the Declaration of Trust, in which Mr. Marwick had declared that he was setting aside this piece of property for the Church.

Q. That was the first information you had concerning the transfer involved in this action, is that correct?

A. Yes. I would say that was either October or November, 1935.

Mr. Gallaudet: Cross-examine.

Mr. McIntyre: No cross examination.

Mr. Gallaudet: That is all. Your Honor will observe in paragraph 1 of the complaint the alleged date of the bankruptcy, and it is admitted by the answer.

The Court: I understand there is no controversy as to the allegations of paragraph 1 of the complaint. [68]

Mr. Gallaudet: I think they are specifically admitted, are they not?

Mr. McIntyre: The bankruptcy is admitted.

Mr. Gallaudet: For your Honor's information, paragraph 1 alleges the adjudication of bankruptcy was July 10, 1936. That is alleged and not denied. Subject, if the court please, to the information referred to awhile ago, in the court's instruction that both counsel examine the files of the bankruptcy court, the plaintiff now rests. [69]

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GEORGE W. WILSON,

called as a witness on behalf of the defendant, First Presbyterian Church of Santa Barbara, being first duly sworn, testified as follows:

The Clerk: Please state your name.

A. George W. Wilson.

The Court: May I suggest, in the light of what has already been disclosed, that unless some incident arises to indicate some other method should be followed, that counsel lead the witness; that he ask leading questions, so that we can cover as much of this ground as we reasonably can.

Mr. Gallaudet: There is no objection, unless the same be made specifically.

The Court: Yes; in other words, I shall assume that both sides are apprised of what are the respective contentions here.

Mr. Gallaudet: Yes.

The Court: And that there is not going to be much controversy about facts, as distinguished from the legal effect to be drawn therefrom.

Mr. Gallaudet: I think that is true, your Honor.



(Testimony of George W. Wilson.)

Direct Examination

Q. By Mr. McIntyre: Mr. Williams, you are a member of the congregation of the First Congregational Church of Santa Barbara? [70]

A. My name is Wilson, and I am a member of the First Presbyterian Church.

Q. I will rephrase that, Mr. Wilson: You were a member of the congregation of the First Presbyterian Church of Santa Barbara during the year 1927, were you not? A. I was.

Q. At that time were you acquainted with James Marwick? A. I was.

Q. Do you recall a meeting of the Church and congregation during the first part of 1927, for the purpose of raising funds to pay off the indebtedness of the Church?

A. Very muchly, yes, sir.

The Court: When did you say that was?

Mr. McIntyre: In the early part of 1927.

The Witness: In January.

Q. By Mr. McIntyre: In January of that year. Will you tell the court in your own words approximately what happened at that time?

A. They were trying to secure subscriptions from the different members of the Church. We had all been considering some kind of a donation, and they had a minister there by the name of Snivley, as I recall the name, and all of a sudden he brings

(Testimony of George W. Wilson.)

Mr. Marwick up on the platform and announces that he has made a big subscription of \$25,000 toward liquidating the debt of this Church; and on the strength of that I know I made my subscription.

[71]

Mr. Gallaudet: I have no objection to the witness proceeding, if it may be understood that legal conclusions may be moved to be stricken out on objection thereto. For instance, we get right down to the matter of this thing when we say on the strength of what Mr. Marwick did.

Mr. McIntyre: I am not entirely sure that is a legal conclusion.

The Court: I take it that the witness, without telling us what the legal effect is of what occurred, may disclose what it was that led him at least to make a subscription, and whether or not other subscriptions were made following this announcement by the minister to the effect that Mr. Marwick had made a subscription of \$25,000.

Q. By Mr. McIntyre: Were you or were you not influenced by that?

A. I was, and gave \$1,000 at that time to pay off the debt.

Q. Were there any other subscriptions made at that time?

A. Yes, I know personally my friend Harry Gentry, who sat by my side, did the same thing.

Q. He made a subscription also of \$1,000?

A. He did.

(Testimony of George W. Wilson.)

Q. Were there other subscriptions?

A. Yes, several of them that I heard of and knew of. In other words, they raised the entire amount of the debt during this campaign on the strength of that donation, or [72] pledge, or whatever you want to call it.

Q. Did you pay your subscription?

A. I did.

Q. Did Mr. Gentry pay his?

A. He did. I was treasurer of the Church for three years afterwards, and I can tell you all of them paid it. I went over to see.

Mr. McIntyre: That is all.

#### Cross Examination

Q. By Mr. Gallaudet: I will ask you this question: Do you know whether Mr. Marwick was an officer or a trustee of the Church at any time?

A. Not to my knowledge.

Mr. Gallaudet: That is all.

Mr. McIntyre: I wish to offer at this time Exhibit No. 1. I think counsel offered in evidence, Exhibit No. 2, Plaintiff's exhibit. I now wish to offer Exhibit No. 1, which is the Declaration of Trust.

Mr. Gallaudet: No objection.

The Court: Then that will become Defendant's Exhibit B.



(Testimony of George W. Wilson.)

DEFENDANT'S EXHIBIT B.

Know All Men by these presents:

That, whereas I, James Marwick, the undersigned, have heretofore offered and agreed to pay to the First Presbyterian Church of Santa Barbara, a corporation, the sum of \$25,000.00 to be applied towards the reconstruction of the House of Worship of said Presbyterian Church and the building of additions thereto, which said agreement was predicated upon my being able to sell certain real property then belonging to myself on LaMesa in Santa Barbara County, California, and

Whereas said property has been sold but under terms and conditions which will not admit of the payment of said sum of \$25,000.00 in cash, and

Whereas I also hold the below described property and am desirous that the said sum of \$25,000.00 shall be a charge against the same,

Now therefore these presents certify:

That I own and hold said property in trust for and as security for the payment of said sum of \$25,000.00 to the First Presbyterian Church of Santa Barbara and that in the event of my death prior to paying said sum of \$25,000.00 or in the event of my failure to pay the same within ten years from date hereof then said First Presbyterian Church of Santa Barbara shall take record title to said property and be the sole owner thereof and I shall relinquish all claims whatsoever thereto. I leave this instrument in the possession of Messrs.

(Testimony of George W. Wilson.)

Schauer & Ryon, attorneys at law, Santa Barbara, California, and they are hereby instructed to carry the terms hereof into effect.

The real property which is the subject of this trust is described as follows:

The following described land in the County of Santa Barbara, State of California, described as follows:

Beginning at the southeast corner of Lot 61, Santa Barbara Estates, as shown in Book 15, at pages 51 to 56, of Maps, records of Santa Barbara County; thence south  $82^{\circ} 25'$  west, 518.23 feet to a point on the easterly line of a road known as Cuervo Avenue, also known as Collado Avenue; thence easterly and northerly along said Cuervo Avenue, the following courses and distances: on a curve concave to the northwest, said curve having a delta of  $25^{\circ} 25' 35''$ , a radius of 63.67 feet, along the arc of said curve 28.26 feet to the end of curve; thence on a curve concave to the southeast, said curve having a delta of  $48^{\circ} 43' 30''$  and radius of 12.85 feet, along arc of said curve 10.93 feet to the end of curve; thence on a curve concave to the east, said curve having a delta of  $15^{\circ} 00'$ , radius of 352.25 feet, along the arc of said curve 92.22 feet to the end of curve; thence along a curve concave to the west, said curve having a delta of  $40^{\circ} 30'$ , radius of 136.35 feet, along the arc of said curve 96.38 feet to the end of curve; thence on a curve concave to east, said curve having a delta of  $40^{\circ} 00'$ , radius

(Testimony of George W. Wilson.)

149.20 feet, along the arc of said curve 104.16 feet to the end of curve; thence on a curve concave to the northeast, said curve having a delta of  $72^{\circ} 00'$ , radius of 89.58 feet, along the arc of said curve 112.57 feet to the end of curve; thence along a curve concave to the south, said curve having a delta of  $31^{\circ} 30'$ , radius 303.22 feet; thence along the arc of said curve 166.70 feet to the end of the curve; thence along a curve concave to north, said curve having a delta of  $53^{\circ} 45' 30''$ , radius 65.76 feet, along the arc of said curve 61.70 feet to end of curve; thence north  $61^{\circ} 44' 30''$  east 197.56 feet to a point on the easterly line of Lot 67 of Hope Ranch Park Subdivision, as shown on the Map recorded in Book 2, at page 24, of Maps and Surveys, in the office of the County Recorder of said County; thence continuing along said course north  $61^{\circ} 44' 30''$  east 145.51 feet to a point; thence north  $32^{\circ} 00'$  west 241.86 feet to a point on the easterly line of said Lot 67 as shown on said map recorded in Book 2, at page 24, of Maps and Surveys; thence along the easterly line of Lots 67 and 69, north 100.00 feet to the point of beginning. Being a part of Lots 67, 66 and 69 of Hope Ranch Park Subdivision according to Map No. 1, recorded in Book 2, at page 24, of Maps and Surveys, in the office of the County Recorder of said County; and part of Lots 3 and 4, Subdivision of The Estate of Thos. Hope, deceased, as per Map filed in the Superior Court for Santa Barbara



(Testimony of George W. Wilson.)

County in Case No. 1021, in the Matter of the Partition of the Estate of Thos. Hope, deceased.

Witness my hand this 28th day of November, 1927.

JAMES MARWICK.

State of California,

County of Santa Barbara—ss.

On this 28th day of November in the year one thousand nine hundred and twenty-seven before me, Mabel Reynolds, a Notary Public in and for the said County of Santa Barbara, personally appeared James Marwick, known to me to be the person whose name is subscribed to the within instrument, and he acknowledged to me that he executed the same.

In Witness whereof, I have hereunto set my hand and affixed my Official Seal, at my office in the said County of Santa Barbara the day and year in this certificate first above written.

[Seal]

MABEL REYNOLDS,

Notary Public in and for the said County of Santa Barbara, State of California.

My Commission expires April 4, 1928.

[Endorsed]: Recorded at request of Schauer, Ryon & Goux, Mar. 24, 1932, at 45 min. past 4 o'clock P. M., in Book 262 of Official Records, page 267 Records of Santa Barbara County, Cal. Yris Covarrubias, County Recorder. By Esther Goss, Deputy Recorder. Fee, \$1.80.

(Testimony of George W. Wilson.)

[Endorsed]: Deft's Exhibit No. "B". Filed June 21, 1939. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

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Mr. McIntyre: We will offer the tax receipts, too, now, if you have no objection.

Mr. Gallaudet: No objection, counsel.

The Court: I believe they are in evidence now as Defendant's Exhibit A. [73]

The Clerk: I have them for identification, your Honor.

The Court: They may be admitted in evidence now as Defendant's Exhibit A.

Mr. McIntyre: I wonder if counsel would mind if we offered the entire pre-trial statement?

Mr. Gallaudet: Let me look at it.

Mr. McIntyre: I don't think it deviates from the evidence so far before the court.

Mr. Gallaudet: In justice to my client I cannot stipulate that all these facts are true.

Mr. McIntyre: I will withdraw my offer of them then. There is one further fact: Would you be willing to stipulate that Mr. Marwick had not paid the subscription he made, except for the making of this deed?

Mr. Gallaudet: I don't think that is true, counsel. I think he made some payment on account.

(Testimony of George W. Wilson.)

Redirect Examination

Q. By Mr. McIntyre: You were treasurer of the First Presbyterian Church during the year 1927?

A. No, sir.

Q. When were you treasurer?

A. 1935 to 1938; three years.

Q. Do you know, from an examination of the church records, whether or not Mr. Marwick paid any cash to the church under that subscription? [74]

A. I have gone through the books all those years and I saw nothing to that effect. I had the books in my charge for three years.

Mr. McIntyre: What information do you have as to his making payment?

Mr. Gallaudet: I have one receipt, counsel, for \$500, and assume there might be others. I can't offer that at the present time, because I can't identify it, but I can't stipulate that he made no payment.

Mr. McIntyre: That, of course, shows a payment of \$500.

Mr. Miller: And also shows there appears to have been other payments.

Mr. McIntyre: My information is that this is an old pledge, made way back. He pledged several times. We have a pledge of \$20,000 which was raised to \$25,000.

The Witness: There were no payments ever made on that \$25,000.



(Testimony of George W. Wilson.)

Q. By Mr. McIntyre: Your examination of the books shows no payment was made on the \$25,000 subscription?

A. It is not on the books to that effect. I don't know anything about the others, because the other pledges I never entered into.

#### Recross Examination

Q. By Mr. Gallaudet: Can you tell me, Mr. Witness, if you recognize that document as being one which apparently [75] came from the First Presbyterian Church of Santa Barbara?

A. It would seem to indicate it by the fact that it has Mrs. Cash's name on there.

Q. Do you know Mrs. Cash?

A. I do, very well.

Q. Is that her signature?

A. I couldn't say as to that. I don't recall the signature; only I see her at church and I know she is a member of the Church, but I do not know her signature.

Q. Would that document refresh your recollection, or cause you now to state that at least the amount shown thereon was paid on account, or what is your present opinion now, after looking at it?

A. I have no way of knowing what this is about, without seeing it. It states there it is a pledge for \$20,400. That has nothing to do with the pledge of \$25,000, of course. He had made a previous pledge, so far as I know.

(Testimony of George W. Wilson.)

Mr. Gallaudet: We ask that the document may be marked only for identification, if the court please.

Mr. McIntyre: What do you wish to establish by the document? Whether or not \$500 was paid is very immaterial in this matter. If you want a stipulation that he paid \$500 on account of even the \$25,000 pledge, I have no objection.

Mr. Gallaudet: I guess it is not necessary that the document be marked, if the court please.

Mr. McIntyre: We just admitted that he paid \$500 on [76] account of this pledge.

Mr. Gallaudet: I have no further questions of the witness.

The Court: Do I understand counsel are stipulating that \$500 was paid on the pledge made in 1927?

Mr. Gallaudet: Counsel asked me to stipulate, in the first place, that no payments had been made, and we have an impression—that is, counsel for the plaintiff have an impression that perhaps more moneys were paid. Now, we can't prove that, and we don't doubt the integrity of any statements that have been made here, but we just happened to find a document that shows that apparently \$500 was paid, and it is marked: Credit. Balance \$19,900. If that relates to the pledge of \$25,000 it would indicate considerably more was paid. I do not believe, however, that the document has been sufficiently identified to warrant its being admitted into

(Testimony of George W. Wilson.)

evidence, but I am certainly glad to stipulate that on at least one occasion he paid \$500, and I have no evidence to offer that he paid any more; but I wondered a little bit why the records of the Church, as a matter of fact, are not more accurate.

The Court: Are the Church records, particularly the books of account, available?

Mr. McIntyre: I doubt if the Church has anything that can be properly identified and offered as a book of account. I am informed that the Church has books from 1931 or '32 on, [77] but back of that time they have no adequate record.

The Court: Mr. Wilson, will you take the stand again?

Q. By the Court: You have already told us that you were treasurer of this Church from 1935 to 1938. During the period that you held the office of treasurer did you have, or were you able to locate, the records of the Church, particularly records as to any moneys paid to it by Mr. Marwick during the year 1927?

A. Judge, I couldn't make any statement as to 1937.

Q. 1927?

A. '27, rather—as to moneys that were received there. The books of the Church at that time were not a complete set of accounting until the treasurer, Paul Scott, was made treasurer either in 1931 or 1932, and he served until I became treasurer in 1935, and during all of those years there was a



(Testimony of George W. Wilson.)

complete record of the receipts and disbursements, absolutely 100 per cent, that any auditor could get an audit, because I have had a lot of accounting experience and I know they were in good condition during those years; but previous to that time they were not kept so well. In '37—I went back of this time, and I don't recall even in '27 there was any money received from Mr. Marwick, but this evidently provides there was, and Mrs. Cash was the one who took care of this. I see it appears he evidently paid \$500 at that time.

Q. By Mr. McIntyre: You found no record at all of pay- [78] ments?

A. There were no payments at all during my administration, or during my position as treasurer.

Q. You have found no record of any payments other than what you have seen in court today, of prior payments?

A. That is all I have seen. The records were very incomplete during those years.

The Court: May I inquire whether counsel for the trustee have undertaken to examine such records of the Church as are available?

Mr. Gallaudet: Counsel for the trustee have made no examination, if the court please, of the records of the Church. I might say I personally discussed the matter with Mr. Griffith, who is an attorney, but who is not an attorney of record here, who verified the answer as president of the Board of Trustees, and who called at my office shortly after I filed this action. At that time we tentatively agreed

(Testimony of George W. Wilson.)

to get all of the witnesses together at one time, in the court room of the Referee in Bankruptcy, and have an examination. That never happened.

The Court: Can't you gentlemen look at those books within the next few days, either in Santa Barbara, or in some other place that is convenient, and then come back here and state to the court what the examination thereof discloses as to any payments made by Mr. Marwick?

Mr. McIntyre: I think we can have an auditor go over [79] them, if satisfactory to counsel, and make a report from the books, and reduce what he finds to writing, and send it to the court.

(Discussion.)

The Court: Why can't you gentlemen bring these books down to Los Angeles?

The Witness: Mrs. Wright's cash book would be about all you would want, because all the money goes through that cash book, and immediately is deposited in the bank through a duplicate deposit slip, so we know that all the money that comes into the Church goes through the bank.

(Further discussion.)

Mr. Gallaudet: Counsel, would you expect your record to show any more than the fact that no moneys were received from James Marwick; in other words, do you expect anything more than that?

Mr. McIntyre: No.

Mr. Gallaudet: I will stipulate, then, in the absence of further proof, the presumption is that no further moneys have been paid; that is to say, I know as a matter of law that is true, and therefore will stipulate in the same manner we spoke about today, as a *prima facie* matter, subject to the matter being rebutted, if it appears to be true that no further moneys, except \$500, which we have agreed upon for the purpose of this trial, were paid.

Mr. McIntyre: That is quite satisfactory to me.

[80]

The Court: I have made a notation that the parties stipulate that on the books of the Church no moneys are shown to have been paid by Mr. Marwick except the sum of \$500.

Mr. McIntyre: I wonder, maybe that is a little further than counsel wanted to go. You wanted to have that subject to rebuttal?

Mr. Gallaudet: If no further evidence is offered in regard to it, the court can make that finding from the evidence.

The Court: May we say there will be a short continuance for the purpose of enabling counsel to check this matter?

Mr. Gallaudet: No, as I understand now, the case is concluded, and we do not ask for any further continuance. In other words, we have offered all our evidence.

Mr. McIntyre: With that stipulation we are perfectly content.



The Court: Then both sides rest, so far as the introduction of evidence is concerned?

Mr. McIntyre: There is one matter which has occurred to me: I don't know, but I rather assume you will make no contention that this property is more valuable than the balance due on the pledge. I might state, offhand, that the property is worth somewhere between \$5,000 and \$7,000, and in no event is it worth over \$10,000.

Mr. Gallaudet: I am willing to stipulate, counsel, that [81] it is not worth more than \$10,000; that is, just for the purposes of this trial.

The Court: It is stipulated, then, for the purposes of this trial only, that the property in question is worth not to exceed \$10,000. Will it be claimed that of the estate involved herein, it is worth more than \$10,000, Mr. Gallaudet?

Mr. Gallaudet: No, no such claim will be made, your Honor. [82]

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I hereby certify that on Wednesday, June 21, 1939, I was one of the duly appointed, qualified and acting shorthand reporters of the United States District Court for the Southern District of California; that as such I took down in shorthand writing all proceedings and testimony had and given in the cause entitled *M. L. Rabbitt, as Trustee in Bankruptcy of the Bankrupt Estate of James Marwick, v. First Presbyterian Church of Santa Barbara, a religious corporation, and James Marwick,*

No. 1428-H Equity, on trial before the Honorable Harry A. Hollzer, Judge; that thereafter I caused to be transcribed into typewriting said testimony. And I hereby certify that the foregoing pages, numbered from 1 to 34, both inclusive, are a full, true and complete transcript of the testimony given in said trial on the date hereinbefore set forth.

Dated at Los Angeles, California, this 16th day of January, 1940.

H. A. DEWING

Shorthand Reporter, U. S.  
District Court, Southern  
District of California.

[Endorsed]: Filed Jan. 18, 1940. [83]

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[Endorsed]: No. 9561. United States Circuit Court of Appeals for the Ninth Circuit. First Presbyterian Church of Santa Barbara, California, a religious corporation, Appellant, vs. M. L. Rabbitt, as Trustee in Bankruptcy of the Bankrupt Estate of James Marwick, and James Marwick, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed: June 25, 1940.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals for  
the Ninth Circuit

No. 9561

M. L. RABBITT, as Trustee in Bankruptcy of the  
Bankrupt Estate of James Marwick,  
Plaintiff and Respondent,

vs.

JAMES MARWICK,

Defendant,

and FIRST PRESBYTERIAN CHURCH OF  
SANTA BARBARA, CALIFORNIA, a re-  
ligious corporation,

Defendant and Appellant.

#### STATEMENT OF POINTS ON APPEAL

Appellant has heretofore filed in the District Court its Statement of Points on Appeal which said Statement of Points on Appeal is contained in the certified record herein. Appellant hereby adopts said Statement of Points on Appeal in this Court and by reference makes said former statement its Statement of Points on Appeal in the above entitled Court.

Dated, June 22, 1940.

SCHAUER, RYON & McMAHON  
ROBERT W. McINTYRE

Attorneys for Appellant First  
Presbyterian Church of  
Santa Barbara, California.



State of California,  
County of Santa Barbara—ss.

Mabel Reynolds, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Santa Barbara; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 26 East Carrillo Street, Santa Barbara, California. That on the 22nd day of June, A. D., 1940 affiant served the within Statement of Points on Appeal on the Attorneys for Plaintiff and Respondent, in said action, by placing a true copy thereof in an envelope addressed to said attorneys at the business address of said attorneys, as follows: Sampson H. Miller, Hubert F. Laughren and Edward Gallaudet, c/o Edward Gallaudet, 110 West Broadway, Glendale, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Santa Barbara, California. That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

MABEL REYNOLDS

Subscribed and Sworn to before me this 22nd day of June, 1940.

[Seal]                      ADA E. SCHOEPF,

Notary Public in and for said County and State.

[Endorsed]: Filed June 25, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

Appellant has heretofore in the United States District Court by designation and stipulation contained in the record certified to this Court, designated the contents of the record upon this appeal. Appellant hereby adopts in this Court its said Designation of Record on Appeal and makes them its designation herein, and in addition thereto as further content of the record on appeal to be printed herein, designates the following documents contained in the record certified to this court:

1. Plaintiff's Exhibit No. 3, a letter from Fred H. Schauer to James Marwick;
2. The Order of the Honorable Albert Lee Stephens, Circuit Judge, extending appellant's time to file transcript on appeal to and including the 25th day of June, 1940;
3. The Stipulation by and between appellant and respondent herein, granting appellant to and including the 25th day of June, [85] 1940, within which to file its transcript on appeal herein, and further stipulating to the contents of the record on appeal, and further stipulating that James Marwick on the trial of the above entitled action withdrew therefrom and disclaimed all interest in the property involved;
4. Stipulation of Fact by and between appellant and respondent herein, dated June 11, 1940, wherein

certain facts not appearing in the transcript are stipulated to.

Dated, June 22, 1940.

SCHAUER, RYON & McMAHON  
ROBERT W. McINTYRE

Attorneys for Appellant, First  
Presbyterian Church of  
Santa Barbara, California.

[86]

State of California,  
County of Santa Barbara—ss.

Mabel Reynolds, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Santa Barbara; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 26 East Carrillo Street, Santa Barbara, California. That on the 22nd day of June, A. D., 1940 affiant served the within Designation of Contents of Record on Appeal on the Attorneys for Plaintiff and Respondent in said action, by placing a true copy thereof in an envelope addressed to said attorneys at the business address of said attorneys, as follows: Sampson H. Miller, Hubert L. Laughren and Edward Gallaudet, c/o Edward Gallaudet, 110 West Broadway, Glendale, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Santa Barbara, California. That there is delivery service by United



States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

MABEL REYNOLDS

Subscribed and Sworn to before me this 22nd day of June, 1940.

[Seal]                      ADA E. SCHOEPF

Notary Public in and for said County and State.

[Endorsed]: Filed June 25, 1940. Paul P. O'Brien, Clerk.

No. 9561

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT ✓

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FIRST PRESBYTERIAN CHURCH OF SANTA BARBARA,  
CALIFORNIA, a religious corporation,

*Appellant,*

*vs.*

M. L. RABBITT, as Trustee in Bankruptcy of the Bankrupt  
Estate of James Marwick, and JAMES MARWICK,

*Respondents and Appellees.*

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## APPELLANT'S OPENING BRIEF.

Upon Appeal from the District Court of the United States for the  
Southern District of California, Central Division.

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SCHAUER, RYON & McMAHON,

ROBERT W. McINTYRE,

26 East Carrillo Street, Santa Barbara,

*Attorneys for Appellant.*

FILED

DEC 17 1940





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No. 9561

IN THE

# United States Circuit Court of Appeals

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FIRST PRESBYTERIAN CHURCH OF SANTA BARBARA,  
CALIFORNIA, a religious corporation,

*Appellant,*

*vs.*

M. L. RABBITT, as Trustee in Bankruptcy of the Bankrupt  
Estate of James Marwick, and JAMES MARWICK,

*Respondents and Appellees.*

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## APPELLANT'S OPENING BRIEF.

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### Statement of Pleadings and Jurisdiction.

This is a plenary action in equity by a trustee in bankruptcy to set aside a deed to certain property located in the County of Santa Barbara, State of California, by the bankrupt, James Marwick, a defendant herein, to defendant and appellant herein, First Presbyterian Church of Santa Barbara, California, a non-profit corporation. The bill in equity sets forth that the deed was given without consideration at a time when the bankrupt was insolvent and further alleges that the deed was given and received with a guilty intent to defraud the creditors of the bankrupt. Both Marwick and the Church are made defend-



ants and both defendants answered, the respective answers being essentially the same. The answers deny any guilty intent to defraud creditors, deny that the deed was given without consideration, affirmatively allege that the property was transferred for an adequate consideration and by a prior declaration of trust made and executed by Marwick, and that the deed sought to be set aside was given in pursuance of the said former transfer by deed of trust, and affirmatively allege that any action to set aside the deed is barred by the statute of limitations (California Civil Code of Procedure, Sections 338-4, 318, 319). The declaration of trust and the deed alleged to have been given in pursuance thereof (the deed sought to be set aside in these proceedings) being set forth verbatim in the answers.

The action is brought under Section 70-e of the Bankruptcy Act, making applicable California Civil Code, Sections 3439 and 3442 to the transfer in question.

### Specification of Error.

In view of the fact that there was essentially no conflict in the evidence, and essentially no dispute over the factual background in these proceedings, appellant's specifications of error are directed to the application of the law to the facts of the case as demonstrated by the evidence; the findings of fact as drawn [Tr. pp. 28 to 31, incl.], are more in the nature of a series of conclusions of law than findings of a factual nature, though the facts as hereinafter set forth are therein contained, intermingled with purely legal conclusions. The memorandum opinion of the court [Tr. pp. 20 to 27, incl.] clarifies the formal findings.

The specifications of error by defendant and appellant fall into three successive steps:

1. The court erred in determining that the deed of 1932 was given without consideration, in the light of the evidence and the declaration of trust dated in 1927.

2. The court erred in determining that the transfer was made by the deed of 1932 instead of the declaration of trust of 1927, and that the transfer was, therefore, made while the bankrupt was insolvent.

3. The court erred in determining that the action to set aside the deed of 1932 was not barred by the statute of limitations of the State of California.

## Statement of Facts.

At the trial of this action there was little controversy over the facts and essentially no conflicts in the evidence, and, with one exception, there has been no controversy upon the effect of the evidence, that is, what conclusion of fact the evidence established. Briefly stated, the facts are as follows:

In January of the year 1927, the defendant, First Presbyterian Church, was attempting to secure subscriptions of funds from its members. At a meeting conducted by a minister named Snivley, the defendant Marwick was brought forward on the platform of the Church by Snivley, who then announced to the assembled congregation that Marwick had made a subscription in the sum of \$25,000.00 towards liquidating the Church debt. Upon the strength of this subscription and induced thereby Mr. George W. Wilson, (the witness establishing the foregoing) Harry Gentry, (a friend of the witness) and others made substantial subscriptions to the Church. These subscriptions were paid [Tr. pp. 77, 78 and 79]. Later, on the 28th day of November, 1927, Marwick executed and delivered to the Church a document which may for convenience be referred to as the trust deed [Tr. pp. 79, 80, 81, 82 and 83]. This trust deed recites that whereas Marwick had theretofore made a pledge in the sum of \$25,000.00 to the Church for the reconstruction of the house of worship predicated upon his being able to sell certain property (not that involved in this action) for a sum sufficient to enable him to pay the pledge, and whereas Marwick had not been able to sell the same for a sufficient sum, and wished to secure to the Church the pledged money; that therefore Marwick owned and held certain other property (described) in trust for and as



security for the payment of the pledge, and that if the pledge were not paid, or the pledgor died within ten years, the Church should take record title to the property described (the property here involved). Except for the sum of \$500.00, the pledge was never paid by Marwick [Tr. p. 91]. On the 26th day of March, 1932, Marwick, finding himself in such a position that he would not be able to pay the pledge because of his age and financial condition, executed and delivered to the Church a deed absolute to the property in question and therein described [Tr. pp. 62, 63, 64, 65, 66, 67 and 68]. This deed, which is very voluminous for such a document, recites the making of the trust deed and its recordation, and further recites that the deed absolute was given in consideration of the Church's release of Mr. Marwick from the obligation of his pledge. This deed, together with a release by the Church thereto attached, was duly recorded in the office of the recorder of the County of Santa Barbara, State of California, the county wherein the property in question is situated, on the 30th day of March, 1932 [Tr. pp. 68 and 69]. The so-called trust deed or declaration of trust had been previously recorded on the 24th day of March, 1932 [Tr. p. 83]. At the date of the making and delivery of the deed absolute, Marwick was insolvent and the Church had knowledge of this fact [Tr. pp. 69 and 70]. No money or property was given by the Church to Marwick in consideration of the deed [Tr. p. 51]. On July 10, 1936, Marwick was duly adjudicated to be a bankrupt [Tr. p. 76], and plaintiff herein is the duly appointed and qualified trustee in bankruptcy in the proceedings therein. Two claims were filed in the bankruptcy proceedings, one by Marie Scheinman arising out of a promissory note made and executed by Marwick on the 1st day of December, 1927, and reduced to judgment before the

Superior Court, Los Angeles county, on the 21st day of September, 1932, in the sum of approximately \$57,000.00, and by the Assets Corporation upon a promissory note made, executed and delivered by James Marwick to Security-First National Bank of Los Angeles on the 14th day of August, 1928, and reduced to judgment before the Superior Court, Los Angeles county, on the 26th day of February, 1936, in the sum of \$14,853.66. There have not been assets in said bankruptcy estate sufficient to pay the claims [Tr. pp. 42 and 43]. The value of the property here involved is not and has not been more than \$10,000.00. The within action was commenced on the 29th day of July, 1938, by plaintiff to set aside the said deed absolute and to obtain an adjudication that the trustee was and is the owner of the property therein described upon the grounds that the deed absolute constituted a transfer both actually and constructively fraudulent. Upon hearing, the court determined that the deed was a constructively fraudulent but not an actually fraudulent transfer [Court's Memorandum of Conclusions, Tr. p. 20], and made its order setting aside the deed. Defendant Marwick appeared by answer, but at the commencement of the trial appeared by attorney, and disclaimed any and all interest in and to the property involved and asked to be excused from further appearance in the matter, which request was granted by the court [Tr. pp. 33 and 34].

## ARGUMENT.

### I.

#### The Court Was in Error in Finding and Deciding That the Deed of 1932 and the Declaration of Trust of 1927 Were Not Supported by Consideration.

A. The evidence shows without contradiction that in January of 1927, Marwick, at a meeting of the Church members, made a subscription to the Church in the sum of \$25,000.00, "to pay off the Church debt". Upon the strength of that subscription, induced by it and in consideration of it, other members of the congregation made and paid substantial subscriptions [Tr. pp. 77, 78 and 79]. On the 28th of November, 1927, Marwick made and executed a certain declaration of trust, by the terms of which it is recited that he, Marwick, having theretofore made a pledge in the sum of \$25,000.00 to be applied toward the reconstruction of the house of worship of the Church, such pledge being predicated upon his ability to sell certain property, and whereas he was not able to sell the property under terms that enabled him to pay the pledge (the property mentioned not being the property involved here), he therefore owned and held certain described property (the property here involved) in trust for, and as security for, the payment of the said pledge. Later, on the 26th day of March, 1932, Marwick made, executed and delivered a deed wherein he recited that he had theretofore made a pledge secured by the declaration of trust, and that the Church was willing to release him from



further obligation for the fee title to the property in said declaration of trust described, and that in consideration of such release, he conveyed the property to the Church. On March 29, 1932, the Church executed the release [Tr. pp. 62 to 69].

B. In the light of the foregoing, the trial court held and decided that the pledge established by the oral testimony of Mr. Wilson and that recited by the declaration of trust were either not the same pledge, or Mr. Wilson's testimony was inaccurate. This conclusion on the part of the court is drawn from the differences between the recitations in the declaration of trust and the pledge as established by the oral testimony, Mr. Wilson testifying that the pledge, as made from the Church, was unqualified and made for the purpose of liquidating the Church debt, and the recitations in the declaration being that the pledge was conditioned on sale of certain property, and that the pledge was toward the reconstruction of the house of worship [Court's Memorandum Opinion, Tr. pp. 20, 21, 22 and 23].

It is the contention of appellant that the inference drawn by the court is unwarranted; the Church debt may well have been for reconstruction thereof; the two recitations are not inherently inconsistent; the qualification may not have been expressed, at the time of making the pledge, as the evidence indicates, and may have later been inserted. The conclusion of the court is important for the reason that if the pledges are identical, and, as the witness Wilson testified, there was consideration for the transfer.

Where members of an organization make pledges thereto, each induced by the others so to do, the pledges are supported by consideration.

*First Trust and Savings Bank v. Coe College*,  
8 Cal. App. (2d) 195, 47 Pac. (2d) 481;

*University of Southern California v. Bryson*, 103  
Cal. App. 39, 283 Pac. 949.

On the other hand, if, as the court decided, the terms of the pledge or subscription are to be determined from the recitations contained in the declaration of trust alone, the subscription was conditional and not enforceable.

## II.

**The Declaration of Trust Constituted a Transfer of the Property in Question, and Was Made While Marwick Was Solvent and Prior to the Date Upon Which the Obligations Pleaded and Proved Arose, and Was, Therefore, Not a Transfer Void as to Existing Creditors, Even in the Absence of Consideration.**

A. Section 70-e of the Bankruptcy Act provides that a transfer void under the state law of the state wherein the bankruptcy court is located shall be void as to the trustee, and it shall be the duty of the trustee to recover the property transferred by action either in the state or federal courts. The foregoing brings into effect Sections 3439 and 3442 of the Civil Code of the State of California as they existed in 1932; in 1939, California enacted the Uniform Fraudulent Conveyances Act, which repealed these sections. We are not here concerned with the modification of the provisions by the new legislation.

Civil Code, Section 3439, provided:

“Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.”

Civil Code, Section 3442, provided:

“In all cases arising under section twelve hundred and twenty-seven, or under the provisions of this title, except as otherwise provided in section thirty-four hundred and forty, the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration; provided, however, that any transfer or incumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors.”

The foregoing provisions render transfers voidable only when made while the transferor is insolvent and then only as to “existing” creditors.

*Schell v. Gamble*, 153 Cal. 448, 95 Pac. 870.

There is nothing in the record that even suggests that Marwick was insolvent at the date of the declaration of trust, Nov. 28, 1927, and the earliest obligation owed by Marwick is the note dated December 1, 1927; the record is silent as to whether or not Marwick had any creditors at the date of the execution and delivery of the trust deed. According to plaintiff's proof, only two



creditors presented claims in the bankruptcy proceedings [Tr. pp. 41 and 42]. No attempt was made to establish that any obligations against Marwick existed prior to the Scheinman note (Dec. 1, 1927). The second obligation did not arise until August 14, 1928.

B. A written declaration of trust whereby the owner of property declares that he holds it in trust for a named beneficiary is a transfer of the property mentioned.

*In re Lamb*, 61 Cal. App. 321, 215 Pac. 109;

*Lynch v. Rooney*, 112 Cal. 279, 44 Pac. 565;

*Wright v. Street*, 3 Cal. (2d) 146, 44 Pac. (2d) 322.

*Wright v. Street*, *supra*, is remarkably similar to the instant case. There a mother executed a document by the terms of which she declared that she held certain property in trust for her daughter; she retained possession of the property for years and did not record the declaration; further she used the property, representing it to be her own to obtain credit; later she gave the daughter a deed to the property and was declared a bankrupt; the trustee brought action in the state courts to set aside the deed; the Supreme Court of the State of California declared that the declaration of trust was the actual transfer, the deed being in conformity thereto could not be set aside.

It is difficult to see how the recent declaration of the Supreme Court of the State of California in *Wright v. Street* can be reconciled with the decision of the trial court in this case. The cases are nearly identical, and, as it is the law of the State of California that is being enforced in this action, *Wright v. Street* is binding and controlling upon the Federal courts in these proceedings.

III.

**The Action Commenced by the Plaintiff Herein Is Barred by the Statutes of Limitations of the State of California.**

A. The action being founded upon a California statute, it is elemental that the action would be barred by the statutes of the same state limiting proceedings.

B. The statutes of the State of California barred the proceedings herein maintained three years after the recordation of the deed in question.

Section 312 of the Code of Civil Procedure provides:

“Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute.”

Section 338-4 of the Code of Civil Procedure provides:

“Within three years:

“4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.”

Chronologically the pertinent events relating to the running of the statute are as follows:

November 28, 1927, execution and delivery of the declaration of trust by Marwick.

March 24, 1932, recordation of the said declaration of trust with the County Recorder, Santa Barbara, California.

March 26, 1932, execution and delivery of the deed by Marwick.

March 30, 1932, recordation of the said deed with the County Recorder, Santa Barbara, California.

July 10, 1936, Marwick adjudicated to be a bankrupt.

May 16, 1938, plaintiff appointed trustee in the bankruptcy proceedings.

July 29, 1938, the within action was commenced.

Both the deed and declaration of trust were duly recorded in March of 1932; Marwick was not adjudicated to be a bankrupt until approximately four years and four months later. The action herein was not commenced until July of 1938, more than six years after the recordation of the documents. Section 338-4 of the Code of Civil Procedure bars the proceedings herein maintained in three years. It had, therefore, been barred approximately one year and four months prior to Marwick's being adjudicated a bankrupt.

C. Plaintiff and respondent seeks to avoid the effect of the Code of Civil Procedure, Section 338-4, on the grounds that the creditor, Scheinman, had no actual notice of the transfer set forth in the declaration of trust and the deed. This contention, followed by the trial court in its decision, ignores the element of constructive notice. It is an elemental principle of law that recorded documents, relating to the transfer of real property, are constructive notice of their contents. California courts have repeatedly held that matters lying in the public rec-



ord are constructive notice sufficient to commence the running of the statutes of limitation.

*Lady Washington Co. v. Wood*, 113 Cal. 482, 45 Pac. 809;

*Hecht v. Slaney*, 72 Cal. 363, 14 Pac. 88;

*Loeffler v. Wright*, 13 Cal. App. 224, 109 Pac. 269;

*Burling v. Newlands*, 4 Cal. Unrep. 940, 39 Pac. 49;

*Wheaton v. Nolan*, 3 Cal. App. (2d) 401, 39 Pac. (2d) 459.

The Supreme Court of the United States has also declared itself on this question, holding that public record of a deed is sufficient notice to commence the running of the statutory period set forth in California Code of Civil Procedure, Section 338-4.

*Teall v. Schroder*, 158 U. S. 173, 39 L. Ed. 938.

The foregoing was an action in equity to force transfer by the defendants to plaintiff of certain lands in California alleged to have been fraudulently conveyed by an attorney in fact of an ancestor of the plaintiffs; a demurrer was sustained to the complaint without leave to amend, and upon appeal from judgment of dismissal the Supreme Court says:

“The law of the state creating the limitations, to which particular reference was made, is found in section nineteen of the Act defining the time for commencing civil actions, passed April 22, 1850; and

in subdivision four of section 338 of the Code of Civil Procedure of California; and further, it was contended that the alleged causes of complaint had become stale because of the lapse of time, according to the general principles of equity, and that the complainants had been guilty of laches in failing to attempt the enforcement of the same at the proper time, and it was insisted that so long a time had passed since the matters took place that it would be contrary to equity and good conscience for the court to take cognizance thereof, and to require any answer to them. Section nineteen of the Act of April 22, 1850, reads as follows: 'An action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued.' This section applies specifically to actions for equitable relief. Other sections of the Act provide for the limitation of actions at law. Subdivision four of section 338 of the Code of Civil Procedure is as follows: 'An action for relief on the ground of fraud or mistake must be brought within four years after the cause of action accrues; the cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.'

"The power of attorney from Teall to Devine was on record from March, 1852, and open to the daily inspection of the complainants and of all parties interested in the title to the property. They could have ascertained, by inquiry, from Teall at any time previous to his death, and from many others afterwards, the character of the title and the reasons why the property was allowed to remain in its then condition and under the control of an attorney in fact of Teall. And the conveyances from Devine to Rhodes and from Rhodes to Devine, which are stated in the bill

to have been made previous to August 1, 1857, were placed on record on the 8th of October, 1857, and remained on record ever afterwards, open to the inspection of all parties desirous of obtaining information respecting their execution or the property to which they related. As the complainants and all other parties interested could have obtained the necessary knowledge upon those subjects by proper inquiries, they are charged with such knowledge from the time those conveyances were placed on record, and held to all the consequences following its acquisition."

An exhaustive brief on the exact point involved in this appeal is contained in 76 A. L. R. 869-870. From the authorities therein collected, it appears that the jurisdictions divide in two lines of decision, one group holding that while documents on the public record are notice of their contents, they are not notice of more; that is, a deed given in fraud of creditors and recorded is notice only of the recitations therein contained, and if there is nothing suspicious upon the face of the document, there is no notice of underlying fraud sufficient to place a defrauded creditor upon inquiry. The other line of decision, probably the majority rule, holds that the deed in itself if recorded is sufficient to place the defrauded creditor upon notice of any fraud in its execution and delivery, such as lack of consideration, etc.

There are no cases holding that the recordation of a deed containing full recitation of the facts surrounding its execution and delivery is not notice of those facts to any creditor claiming to have been defrauded thereby.



In the case at hand, the declaration of trust, the deed, and the resolution of the Church board accepting the deed, and releasing Marwick were all on record more than four years prior to the inception of the bankruptcy proceedings and more than six years prior to the commencement of this action. Whichever of the established rules may be followed, it can hardly be contended that the documents do not contain recitations completely explaining the circumstances under which the property was transferred. As a matter of fact, the trial court found sufficient in the documents to overthrow the testimony of the only witness testifying as to consideration for the deed. Surely, if the recitations in the documents are sufficient to negative the testimony that there was consideration and warrant findings that consideration was lacking, they are sufficient to constitute notice of such want of consideration to creditors.

### Summary.

I. The evidence was not such as to justify the finding that the transfer in question was not supported by consideration.

II. Even assuming that the finding of want of consideration was proper, the evidence did not justify the court in finding that the transfer was void as to existing creditors because made at a time when the bankrupt was insolvent, the evidence showing conclusively and without conflict that the transfer was made while the bankrupt was presumably solvent and prior to the dates when his creditors' claims arose.

III. Even assuming want of consideration and that the transfer did not occur until 1932, still the evidence showed conclusively and without conflict that the proceedings were barred by Section 338-4 of the Code of Civil Procedure of the State of California, and the finding of the court that the action was not barred is erroneous.

### Conclusion.

For the foregoing reasons it is urged that the judgment of the court below should be reversed.

Respectfully submitted,

SCHAUER, RYON & McMAHON,

ROBERT W. McINTYRE,

*Attorneys for Appellant.*

No. 9561.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT 9

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FIRST PRESBYTERIAN CHURCH OF SANTA BAR-  
BARA, CALIFORNIA, a Religious Corporation,  
*Appellant,*

*vs.*

M. L. RABBITT, as Trustee in Bankruptcy of the  
Bankrupt Estate of James Marwick, and JAMES  
MARWICK,

*Respondents and Appellee.*

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## APPELLEE'S BRIEF.

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*Respondents and Appellee.*

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## APPELLEE'S BRIEF.

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### STATEMENT OF FACTS.

This brief is filed on behalf of M. L. Rabbitt as trustee in bankruptcy of the bankrupt estate of James Marwick, who will hereinafter be referred to as the "appellee", or "respondent". Although James Marwick is nominally an appellee, he is not an actual party to this appeal, and will be referred to as "Marwick".

Appellee accepts the Statement of Pleadings and Jurisdiction of appellant. The Statement of Facts of appellant is substantially correct except as to the statement that the trial court "determined that the deed was a construc-

tively fraudulent but not an actually fraudulent transfer". The court specifically found that the deed was given and received with intent to hinder, delay and defraud the creditors of Marwick. This point will be developed further at a later place in this brief.

Defendant's Exhibit B appearing in the transcript at page 80 has been variously referred to all through these proceedings as "deed of trust", "trust indenture" and "declaration of trust", due to the fact that the document itself bears no title. It should be borne in mind, therefore, that the same document is under consideration wherever these various designations appear.

## ARGUMENT.

### I.

#### **The Finding of the Court That There Was No Consideration for the Trust Indenture Was Amply Supported by the Evidence.**

The foregoing point is in response to Subdivision I of appellant's argument.

A. It was stipulated that no consideration was given for the transfer involved herein except for the recitations contained in the trust indenture (Defendant's Exhibit B) and the deed (Plaintiff's Exhibit 2) (Appellant's Statement of Facts, App. Op. Br. p. 5).

As indicated by appellant's argument, the only evidence relied upon by appellant to show consideration is the oral testimony of George W. Wilson and the statements

contained in the declaration of trust. To determine the theory upon which this case was tried as to this issue, brief consideration should be given to the pleadings. Paragraph III of plaintiff's First Cause of Action alleges that Marwick owned the real property involved in this action at all times to and including on or about March 30, 1932 (the approximate date of the deed). Paragraph IV alleges that on or about the said date, the transfer in question was made without consideration. In answer to these allegations [Tr. pp. 13, 14 and 15] the appellant herein alleges that on or about November 28, 1927, Marwick entered into a subscription agreement wherein he agreed to pay to appellant the sum of \$25,000.00 "for the reconstruction of the house of worship of said answering defendant for and in consideration of the promises of certain other members of said First Presbyterian Church of Santa Barbara, California, to pay to said First Presbyterian Church certain sums by them subscribed"; that the other members paid their subscriptions and that the Church expended the money in reliance upon Marwick's promise. The Answer then alleges that the trust indenture and the deed were given pursuant to the above pledge agreement.

It will be observed that the issue thus presented by the appellant in its Answer is in conformity with a pledge agreement of the type referred to in the trust indenture and has no apparent connection with the oral pledge referred to in the testimony of George W. Wilson. Wilson



refers to a meeting in January of 1927 and to a subscription or pledge to pay off indebtedness of the Church [Tr. p. 77]. The Answer and the trust indenture apparently refer to a pledge "prior to the 28th day of November" which was made "for the reconstruction of the house of worship". The logical conclusion is that either Wilson's memory was bad or that the subject matter of his testimony had no connection with the transfer of the property involved in this action, and this was the conclusion of the trial court [Memorandum of Conclusions and Minute Order, Tr. pp. 21 and 22].

B. The declaration of trust contains no unqualified promise to pay money. As stated, this document is Defendant's Exhibit B, and is contained in the Clerk's Transcript on pages 82 and 83. It recites that Marwick has theretofore agreed to pay \$25,000.00 but adds that this agreement was conditional. It contains none of the facts required by law to support a binding pledge agreement.

C. Aside from what has been said above, Wilson's testimony falls far short of establishing an enforceable subscription agreement. The law of the State of California is clear on this matter.

A general discussion of California law on this subject is contained in Volume 23 of California Jurisprudence commencing at page 953.

Of all the cases decided in this state on the subject matter of the validity of subscriptions, the one in which

the facts most closely correspond to the instant case is *Board of Home Missions, etc., v. Manley*, 129 Cal. App. 541, 19 Pac. (2d) 21. In this case an action was filed against the executrix of an estate which was based upon a written subscription which contained an unqualified promise to pay. The opinion of the Court states that it is the general rule that a promise to pay a subscription is ordinarily a mere offer which, in the absence of a consideration, may be withdrawn at any time before acceptance. It further states that acceptance "can only be shown by some act on the part of the promisee whereby some legal liability is incurred or money expended on the faith of the promise". In the case now before the Court there was obviously no evidence whatever that any legal liability was incurred or money expended on the faith of Marwick's alleged promise. The above quoted case, however, goes on to point out that there is an exception to the rule above quoted, where there is a mutual promise by several individuals to contribute to the payment of an aggregate sum. The case then points out that other individuals concurred with the deceased in making subscriptions and the following language, which counsel for appellee consider to be of distinct importance, appears:

"However, as these subscriptions were not for the payment of an aggregate sum to be used for a specified purpose upon which appellant had incurred any obligation or expense prior to the death of deceased, they cannot be said to be mutual promises sufficient to constitute a consideration for her subscription."

The instant case falls far short of meeting the above requirements. Appellant incurred no obligation and expended no money on the strength of Marwick's alleged subscription.

In support of its contention that an obligation existed, appellant cites two California cases as follows:

*First Trust and Savings Bank v. Coe College*, 8 Cal. App. (2d) 195. In this case the written subscription agreement contains the following language: "But also that it may be used in securing gifts from others to the same objects."

The opinion of the Court points out that the evidence shows that the note was so used and the opinion also points out that the College accepted the offer of the subscriber by acting upon it and thereby supplying the necessary consideration. The *Coe College* case in no way overrules the case of *Board of Home Missions, etc., v. Manley, supra*, but expressly confirms it, by citing it as authority for the proposition that a subscription which is not accepted or acted upon in any way and which is not one of many making up an aggregate sum, is a mere offer to make a gift, and is revoked by the death of its maker.

The other California case relied upon by appellant is *University of Southern California v. Bryson*, 103 Cal. App. 39. In this case the necessary consideration was held to have existed because there were reciprocal promises to pay a definite and fixed amount of money and because the University accepted the offer by incurring



expenses because of it. It is interesting to note that the Court in arriving at its conclusion distinguishes the case from the previous case of *Grand Lodge, etc., v. Farnham*, 70 Cal. 158, by pointing out that in the *Grand Lodge* case, although there were a number of subscriptions, the subscription in question was not conditioned upon the raising of any specified fund, and the Grand Lodge did not act in reliance upon the fulfillment of the pledge.

The point of distinction then between the cases where the subscription is held to be a valid promise and where it is not, is that in order to be a valid promise either the charitable institution must have performed some act such as incurring an indebtedness which it would not have incurred had it not been for the subscription, or where the subscription agreement specifically provides that a number of subscribers, each in consideration of the subscription of the other, agree to raise a specified sum. Neither of these conditions was present in the Marwick case.

Another way to determine the matter here involved is to consider this question: Could the appellant on or after November 28, 1927, (the date of the declaration of trust) have maintained an action against Marwick for the sum of \$25,000.00, or any other similar sum, based upon the allegations in appellant's answer and upon the evidence submitted to the trial court? Appellee respectfully submits that, under the above authorities, there was a complete failure on the part of appellant to prove that it had such a cause of action against Marwick.

II.

**The Declaration of Trust Was Not a Valid Transfer of the Property in Question.**

This subdivision is in response to the argument of appellant, commencing on page 9 of its opening brief.

A. Section 1624 of the Civil Code of the State of California provides that real property can be sold only by an instrument in writing. We must therefore examine the terms of the trust indenture to see if it contains any words which could reasonably be construed to transfer the property in question. The important provisions of the trust indenture are "that I own and hold said property in trust for and as security for the payment of said sum of \$25,000.00 to the First Presbyterian Church of Santa Barbara and that in the event of my death prior to paying said sum of \$25,000.00 or in the event of my failure to pay the same within ten years from date hereof then said First Presbyterian Church of Santa Barbara shall take record title to said property and be the sole owner thereof and I shall relinquish all claims whatsoever thereto." It appears very certain to counsel for the appellee that nowhere in this language can be found any intention on the part of Marwick to then and there convey, grant or transfer the property in question to the Church. Grant deeds and other forms of deed are easily obtainable and had it been the intent to execute a deed, this would undoubtedly have been done. On the contrary, however, the instrument itself negatives any idea of a present conveyance because of the recital that Marwick wishes the sum of \$25,000.00 to be a "charge" against the property. Furthermore, the document was not recorded until March of 1932 and during the time between its date and its recordation, it appears to have been in the possession of

Mr. Schauer, who was the attorney for Marwick, although it is true that Mr. Schauer testified that he likewise handled the transaction for appellant. In any event the document itself recites that it is left in the possession of Messrs. Schauer and Ryon for the purpose of carrying it into effect; which precludes, in the opinion of counsel for appellee, any present intention to either transfer the title, or deliver the document to the appellant. Furthermore, Plaintiff's Exhibit 3 [Tr. p. 58], the letter from Mr. Schauer to Marwick, which letter refers to the trust indenture, indicates it was the intention of the parties that title to the property be transferred in March of 1932 rather than in 1927. In addition, the deed [Plaintiff's Exhibit 2, Tr. p. 62] places a construction on the trust indenture in the first recital which states that the trust indenture was intended to be security and describes it as imposing a lien on the real property therein and hereinafter described. Again it is necessary to turn to the pleadings to determine the theory of appellant as advanced in the trial court. In paragraph II of its Answer [Tr. p. 14] appellant alleges "That thereafter, upon the said 28th day of November, 1927, the said James Marwick, to secure the payment of said promise by him made, to pay said sum of \$25,000.00 to said defendant, did make, execute and deliver to said defendant a certain deed of trust, a copy of which said deed of trust is hereto attached and made a part hereof as 'Exhibit A'; that said deed of trust was duly recorded in book 262, page 267, of the Official Records of the County of Santa Barbara, State of California, on the 24th day of March, 1932; that by the terms of said deed of trust said James Marwick did irrevocably transfer and assign said real property described in said paragraph III unto said defendant as



security for the payment of said sum of \$25,000.00.” It will thus be observed that the position of appellant has been that the trust indenture, or as it is sometimes referred to, the deed of trust, was intended as security, in the sense that a mortgage or trust deed is customarily given as security, and not as an outright transfer of the property. In view of all of these circumstances, appellee submits that the evidence could not possibly support a finding of fact that the property was transferred or conveyed to the appellant by virtue of the terms of the deed of trust.

B. The trust indenture did not create a valid lien or encumbrance against the property.

Section 2924 of the Civil Code of the State of California provides as follows:

“Every transfer of an interest in property other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage.”

Regardless of insolvency or existing creditors, a mortgage on real property, or a trust deed of the type commonly given as security in the State of California, is void unless supported by a consideration.

17 *Cal. Juris.*, p. 710, contains the following statement of law, well supported by authority:

“The doctrine is established in California that a mortgage or mortgage lien is a mere incident of the debt or obligation which it is given to secure. The debt, note or other obligation is the principal thing, the duty to pay or perform it is none the less binding because it is secured by mortgage. The mortgage has no existence independent of the thing secured by

it. The debt and mortgage are inseparable; the latter must follow the former; and as distinct from the debt, the mortgage has no determinate value and is not a subject of transfer.”

In volume 25, *Cal. Juris.*, p. 36, it is said:

“A trust deed given without consideration is of no force or effect.”

It is apparent from the above statements of law that the Court could find that the trust indenture in this action created a valid lien only if it finds that at the date of its execution there was a debt due from Marwick to the appellant. We believe we have heretofore shown that there was no such debt due.

C. The trust indenture did not of itself create an obligation against Marwick in favor of appellant. In addition to what has been said before on this point, we again desire to closely examine the provisions of the trust indenture. It recites that Marwick has heretofore agreed to pay to appellant the sum of \$25,000.00, but it goes on to say that this agreement was conditional upon Marwick's being able to sell certain real property not involved in this action, and that he has not been able to sell the property. At no other place does the document contain an unqualified agreement to pay money. Even though, however, such a promise be implied from the document it is no more than a promise to make a gift in the future and, as such, is unenforceable.

*Wisler v. Tomb*, 169 Cal. 382.

The most favorable construction possible to the appellant of the deed of trust is that it contained a promise by Marwick that he would in the future either pay a specific sum of money or transfer the title to the property involved. Inasmuch as this promise was not based upon a valuable consideration, under the above authority it is "of no legal consequence".

D. The trust indenture did not create an enforceable trust. On page 11 of its brief appellant argues that an enforceable trust was created and cites three cases in support of its contention. We believe the case of *In re Lamb*, 61 Cal. App. 321, cited by appellant, supports the theory of the appellee rather than that of appellant, and we therefore quote from this case as follows (*italics ours*):

"True, it is not essential that the creator of a trust should constitute a third person trustee and transfer the legal title to him. It is well settled that one may create a trust in his own property by constituting himself a trustee, *provided his words or acts clearly and unequivocally denote an intention to hold the property henceforth as trustee for the benefit of another*; \* \* \* but even so it still is necessary that there be specific property to be held by the settler as trustee, *and an absolute parting by him with that beneficial interest which had been his up to the declaration of the trust.*"

In connection with the above-quoted case we again point out that, by the terms of the trust indenture, Marwick did not absolutely part with his title to the property. In the case of *Lynch v. Rooney* the facts are quite different from those now before this court. The principal case relied upon by appellant, however, is the case of



*Wight v. Street*, 3 Cal. (2d) 146, 44 Pac. (2d) 322. There is a certain superficial resemblance between this case of *Wight v. Street* and the instant case. A careful reading of the case, however, will show that the following differences exist:

1. The letter creating the trust in the *Wight* case says “it being held in trust by me for her until she and I agree on a time for the transfer to her.” The Marwick trust indenture does not recite that Marwick holds the property in trust for the First Presbyterian Church; it states that he holds the property “in trust for and as security for the payment of said sum of \$25,000.00 to the First Presbyterian Church.” There is a vast difference between property pledged as security for a debt and property presently transferred in trust with intent that title shall then and there pass.

2. The Marwick trust provides that the property will be transferred at some future date or time, to-wit,

“that in the event of my death prior to paying said sum of \$25,000.00 or in the event of my failure to pay the same within ten years from date hereof, then said First Presbyterian Church of Santa Barbara shall take record title to said property and be the sole owner thereof, and I shall relinquish all claims whatsoever thereto.”

This language indicates the transfer shall take place, not at the date of the instrument, but either ten years thereafter or at the time of Marwick’s death, neither of which time or event had expired or happened on the date of Marwick’s adjudication as a bankrupt. At the date of the deed (Plaintiff’s Exhibit 2) Marwick, therefore, was the owner of the property.

3. As has been shown above, the theory of the instant case as presented to the trial court was that, by the terms of the trust indenture, the property in question was made security for a debt and was not, in itself, transferred in whole or in part. In other words, had Marwick paid off the \$25,000.00 the appellant would have had no claim to the property and no such situation as this existed in the case of *Wight v. Street*.

4. The deed (Plaintiff's Exhibit 2) also lays a construction upon the trust indenture. It recites [Tr. p. 63]:

“Whereas said James Marwick \* \* \* heretofore made a pledge \* \* \* which pledge was secured by an instrument dated November 28, 1927, \* \* \* imposing a lien on the real property therein and hereinafter described.”

This is a further absolute indication that no present trust was intended by the parties, but that the only intent was that a lien be created.

If we did not feel that the case of *Wight v. Street*, *supra*, was so different in its facts from the instant case we would undertake to show that it is not good law. We feel that this argument, however, is unnecessary except to observe that the opportunity for fraud is great and that under its authority any person who intends to engage in an enterprise which might prove hazardous could execute such a document as that described in *Wight v. Street* in favor of his children. He could then retain the document, undelivered to anyone, and if things went well for him, it could be destroyed. If he became involved the claims of his creditors could be avoided.

III.

**This Action Was Not Barred by the Statute of Limitations.**

A. Section 338 of the Code of Civil Procedure, quoted on page 12 of appellant's brief, clearly states that a cause of action for relief based on fraud does not accrue until discovery of the fraud. As stated by appellant in its statement of facts, Mrs. Marie Scheinman's claim against Marwick arose out of a promissory note dated December 1, 1927, was properly proved in the bankruptcy proceedings herein involved, and has never been paid. The trustee in bankruptcy, appellee herein, therefore succeeds to her rights. The evidence affirmatively showed that she first learned of this transfer about a year before Marwick was adjudged a bankrupt. Appellant admits all of the foregoing, but contends that the recordation of the trust indenture and the deed were constructive notice to Marwick's creditors and it is only this proposition of constructive notice that need here be argued. On pages 14, 15 and 16 of its brief appellant cites several cases in support of its theory that the recording of these documents was constructive notice to Marwick's creditors. Counsel for appellee have read these cases and find that they are not in point and, as we understand it from the language appearing on pages 16 and 17 of appellant's brief, appellant contends there are no cases on the exact point decided by the appellate courts of the State of California. Counsel for appellee have found no cases holding that the recording of a document is of itself notice to all the world of its contents. It is to be observed that there are many counties in the State of California and no one would expect a creditor who, as far as the record discloses, did not know that Marwick owned property in



Santa Barbara County, to go from county to county to ascertain whether or not a transfer of property had been made. Aside from this theoretical argument, however, we believe the case of *Krause v. Marine Trust & Savings Bank*, 93 Cal. App. 681, 270 Pac. 246, disposes of the question here under discussion. The case says:

“The public record of any instrument which is by law required to be recorded or which is entitled to be recorded is constructive notice only as to *subsequent* purchasers or interested parties. A prior purchaser or interested party is not affected thereby.”

The above case also cites Section 1213 of the Civil Code and 22 Cal. Juris. 616. Attention is also called to the case of *Karns v. Olney*, 80 Cal. 90, 22 Pac. 57. This case, in discussing the case of laches, says:

“The court finds that the deeds bringing the title down to the respondent were recorded immediately after their execution, and were constructive notice to the appellant. Conceding this, it makes the effort to mislead the appellant only the more apparent; but the doctrine of constructive notice has application only to a subsequent purchaser or incumbrancer, and can have no bearing on the question presented here.”

In view of the foregoing authority we submit that the recording of the trust indenture and the deed gave no notice which could commence the running of the statute of limitations of the State of California.

If the statute had not run on the date of Marwick's adjudication in bankruptcy (four years after the recording of the deed and trust indenture), it would not run until two years after the closing of the bankrupt estate.

*Hansen v. California Bank*, 17 Cal. App. (2d) 80, 61 Pac. (2d) 794.

IV.

**Regardless of All That Has Been Heretofore Said, the Transfer From Marwick to Appellant Was Actually Fraudulent and Therefore Void Without Without Regard to Insolvency.**

This proposition is ignored by appellant in its brief except for the statement contained on page 6 thereof that the court determined that the deed was not actually fraudulent. The only substantiation for this statement is the fact that the trial court allowed appellant a lien on the property for taxes advanced by it. However, the memorandum opinion of the trial court, commencing on page 20 of the clerk's transcript, and with particular regard to page 24, states as follows:

“Thus it appears that the defendant Church accepted the conveyance of the property in question with the knowledge of the fact that Marwick was then indebted to certain creditors and that he was unable to pay such debts, and that, by accepting said conveyance, the Church would aid in preventing these creditors from collecting what was owing to them.”

Furthermore, this opinion was followed by formal findings of fact and conclusions of law. Paragraph V of the findings of fact [Tr. p. 30] states that the deed was received by appellant “with intent to hinder, delay and defraud the creditors of the said Marwick”. In view of this finding, which is not attacked in this appeal, the question of insolvency would be immaterial, and the transfer is void as against all creditors and their successors in interest. Section 3439 of the Civil Code of the State

of California as it existed at the time this action was commenced and at the time of the transfer provides as follows:

“Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.”

Under the foregoing provision of law, if there is actual intent to hinder, delay and defraud creditors, the question of consideration is immaterial. The case of *Benson v. Harriman*, 55 Cal. App. 483, 204 Pac. 255, states as follows:

“Moreover, the rule in this state is that, if a conveyance is made with intent to defraud creditors it is void, notwithstanding the debtor has other property ample in amount to satisfy his creditors.”

The same rule of law is contained in the following cases:

*Swinford v. Rogers*, 23 Cal. 233;

*Atkinson v. Western Development*, 170 Cal. 503;

*Cioli v. Kenourgios*, 59 Cal. App. 690.

The letter written by Mr. Schauer to Marwick [Plaintiff's Exhibit 3, Tr. p. 58] is positive evidence of the intent, both on the part of appellant and on the part of Marwick, to hinder, delay and defraud Marwick's existing creditors. It will be observed that this letter is an integral



part of the transfer inasmuch as it contains specific instructions for the execution of the grant deed and related specifically to the deed of trust, neither of which had been theretofore recorded. Counsel for appellee urge that this letter, standing alone and without any other evidence as to the transaction involved, compels a finding that an attempt to hinder, delay and defraud Marwick's creditors was the very basis of the transaction here attacked and inevitably leads to a judgment for the appellee.

### Conclusion.

It is to be observed that in its statement of points on appeal [Tr. p. 94] appellant adopts its statement of points made to the District Court [Tr. p. 39]. Only three points are made, and they have been considered above. No exception has been taken to the findings of fact of the trial court, which include, as above stated, the finding that the transfer in question was actually fraudulent. Furthermore, no specific exception has been made to finding No. 3, which recites that Marwick owned the real property in question on and prior to March 26, 1932. It is true that appellant has argued that the declaration of trust was a transfer, but counsel for appellee believe that is not a sufficient exception to the finding in question. It is appellee's position, therefore, that

1. At no time was there a debt due from Marwick to appellant and therefore there was no consideration for the transfer.

2. The trust indenture was, at the most, an attempt to cause property to be given as security for a debt which was not in existence, and the trust indenture was therefore of no effect.

3. The action was not barred by the statute of limitations.

4. Regardless of whether the transfer was made while Marwick was solvent or insolvent, and regardless of consideration, the transfer was void as to appellee because of the actual fraud involved.

5. The specific findings of fact above referred to amply support the judgment, and these findings have not been properly attacked and have not, in any event, been shown to be erroneous.

Respectfully submitted,

EDWARD GALLAUDET,  
HUBERT LAUGHARN and  
SAMPSON MILLER,

By EDWARD GALLAUDET,

*Attorneys for Appellee.*

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

FIRST PRESBYTERIAN CHURCH OF SANTA BARBARA,  
CALIFORNIA, a religious corporation,

*Appellant,*

*vs.*

M. L. RABBITT, as Trustee in Bankruptcy of the Bankrupt  
Estate of James Marwick, and JAMES MARWICK,

*Appellees.*

---

## PETITION FOR REHEARING.

---

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**FILED**

**JAN - 3 1941**

**PAUL P. O'BRIEN,**  
**CLERK**





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No. 9561

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

FIRST PRESBYTERIAN CHURCH OF SANTA BARBARA,  
CALIFORNIA, a religious corporation,

*Appellant,*

*vs.*

M. L. RABBITT, as Trustee in Bankruptcy of the Bankrupt  
Estate of James Marwick, and JAMES MARWICK,

*Appellees.*

---

## PETITION FOR REHEARING.

---

This petition for rehearing is directed to that portion of the opinion of this Court which modifies the judgment of the lower court and which commences with the following words: "The judgment avoided not only the deed, but also the declaration of trust."

Counsel for appellee believe this petition for rehearing is entitled to unusual consideration because the opinion of the Court herein complained of raises a point which is entirely new to these proceedings.

I.

**The Point in Question Was Not Raised by Appellant.**

We urge the Court to carefully consider that the argument contained in that portion of the opinion with which we disagree was not raised by the appellant and that this is of utmost importance for the reason that had this point been raised, we would have caused matter to be put in the record which we did not deem necessary. To be more explicit, page 39 of the clerk's transcript contains the points relied upon in the appeal by appellant, to-wit, (1) there was consideration for the transfer; (2) the transfer was made prior to the incurrence of obligations of creditors; (3) the action was barred by the statute of limitations. These three points are reaffirmed by the document filed by appellant appearing on page 94 of the clerk's transcript. After the statement of points was filed it became necessary to prepare the record and both sides had an opportunity to cause such matter to be inserted as they deemed proper. Counsel for appellee hereby state to this Court that it is their positive recollection that there were considerable discussions, oral understandings and agreements made during the course of the trial and considered by the trial court which are not contained in the record for the reason that they were, in our opinion, unnecessary to rebut the points relied upon by appellant as above stated. In other words, we believe that while the reporter wrote up all of the actual questions and answers asked of the witnesses, he did not take down all the discussions and stipulations of counsel. The effect of these discussions and stipulations was that it was agreed there was no consideration for the declaration of trust other than a pre-existing subscription agreement which appel-

lant undertook to prove and which it failed to prove, and the result of which was that the trial court properly considered that the declaration of trust was squarely presented as an issue and which amply supported the finding of the trial court that there was no consideration for the declaration of trust. Had the appellant in its statement of points to be relied upon raised the proposition that it was a holder of a valid encumbrance against this property and the trial court had no right to find this encumbrance to be void or invalid, we should have, as counsel for appellee, had an opportunity to insert such matter in the record as we thought bore upon that issue. We believe this Court has gone on the assumption that everything that happened before the trial court is contained in the record and we assert that this Court can only conclude that such matters are in the record as bear on the points raised by appellant on the appeal. We specifically call the attention of this Court to rule 19 of the Rules of the United States Circuit Court of Appeals for the Ninth District. Subdivision 6 states that the appellant shall file with the clerk a statement of the points on which he intends to rely on the appeal and that the adverse party shall, within ten days thereafter, designate in writing additional parts to the record which he thinks material. The rule then continues with these words: "If the appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the Court shall think proper." We believe that this rule prohibited us from causing anything to be put in the record which did not bear directly on the points raised by appellant and that this Court has been unfair to the appellee in inserting into this proceeding a matter not raised by the appellant.



II.

**On the Record As It Now Stands That Portion of the  
Opinion Complained of Is Erroneous.**

We submit that the record now before the Court discloses that the declaration of trust was sufficiently presented to the trial court so that it had a right to pass upon it. The declaration of trust was set up in the answer and the entire case was tried on the theory that it was an integral part of the transfer under attack and furnished the consideration claimed by appellant for the deed. The answer states that "James Marwick, prior to the 28th day of November, 1927, made and entered into a certain subscription agreement by the terms of which he agreed to pay to the said answering defendant the sum of \$25,000.00 for the reconstruction of the house of worship." The answer then continues "that thereafter \* \* \* the said James Marwick, to secure the payment of said promise by him made, to pay said sum of \$25,000.00 to said defendant, did make, execute and deliver to said defendant a certain deed of trust." It should be observed that the appellant's theory is not that the deed of trust supplies its own consideration but that it was given in consideration of a pre-existing debt, to-wit, a subscription agreement. In support of this allegation and without opposition by counsel for appellee, testimony was offered by appellant in an attempt to prove the existence of this pre-existing promise. This is the only consideration for the deed of trust claimed by the appellant and on this evidence the trial court found that the alleged consideration did not exist. As suggested by one of the judges of this

Court at the time of oral argument, a written agreement purports consideration, but it must also be borne in mind that when the consideration, if any, is carefully inquired into and found to be non-existent, a Court then can properly find that there was no consideration and the trial court did so find. Attention is called to the prayer of the answer. It asks that if the Court finds the deed to be void, the Court then give appellant a lien for taxes. This is exactly what the Court did and we fail to see how the trial court can be held to be in error for arriving at the exact results asked by the appellant in its answer upon finding that the deed was void, which finding has been upheld by this Court.

Furthermore, appellant concedes by its brief on file before this Court, that “if, as the Court decided, the terms of the pledge or subscription are to be determined from the recitations contained in the declaration of trust alone, the subscription was conditional and not enforceable.” (App. Br. p. 9.) We respectfully ask the Court how, if the subscription were not enforceable, it could hold that there was any consideration for the declaration of trust? We showed in our brief that a mortgage is unenforceable and of no effect unless based on a consideration and that a mortgage can have no existence independent of the note or obligation which it is given to secure. (Appellee’s Br. pp. 10 and 11.) We therefore urge that this Court cannot hold this declaration of trust to be a valid mortgage unless it holds that there was a valid and subsisting debt or obligation which the mortgage was given to secure and this debt or obligation is entirely lacking from this case.

III.

**In Any Event This Court Should Not Have Interpreted the Declaration of Trust As It Did.**

The opinion states: "The judgment avoided not only the deed, but also the declaration of trust. This was error. Avoidance of the declaration was not sought in this action. The declaration was not mentioned in the complaint. It was pleaded in the answer and put in evidence by appellant. Its validity was not challenged by pleading or by proof. There was, therefore, no basis for holding it void." This Court having held as above that the declaration of trust was not in issue, it then proceeds in the opinion to pass upon the legal effect of the declaration of trust, thereby doing exactly what it holds the lower court should not have done. If the declaration of trust were not in issue, this Court then had no right to decide that the declaration of trust "was, in effect, a mortgage." Further, this Court had no right to decide that "appellant's rights under the declaration were and are those of a mortgagee holding a valid subsisting mortgage," etc. From the foregoing we believe it follows that if this Court is correct in its statement that the declaration of trust was not in issue, it should modify the judgment of the lower court only to the extent of adjudging that the rights of the parties under the declaration of trust are not hereby decided, and these should be relegated to an appropriate action for that purpose.

Counsel for appellee believe that appellee has a good defense to any action which might be commenced by appellant to foreclose the declaration of trust as a mortgage. No such foreclosure was sought in the instant case and this Court has held that the declaration of trust was



not in issue. It is manifestly unjust, therefore, for this Court to now prevent appellee from urging, at an appropriate time in the future, that the declaration of trust was of no effect.

Let it be assumed that the declaration of trust had never been presented to the trial court and that the trial court had declared the deed to be void. This Court in its opinion holds the trial court could and should have done just that. The position of the parties would then be as follows: Appellee would be the owner of the property and appellant would be in possession of the declaration of trust and have the right to enforce whatever rights it had under it. The only way it could enforce any such right would be to commence an action to foreclose the document as a mortgage. In order to do this it would have to allege and prove that there was a consideration for the mortgage. While it is true that under certain circumstances a written document purports a consideration, we do not believe this Court would hold that a plaintiff in an action to foreclose a mortgage could prevail in his action by merely introducing the mortgage into evidence and not proving the note or other obligation which it was given to secure. Yet, that is the effect of the present decision.

Consideration should be given to the theory upon which the case was tried. The appellant set up the declaration of trust in its answer but it did not claim or allege that the declaration of trust gave rise to any rights in favor of appellant other than as owner of the property. Appellant's position in this connection is supported in the opinion of the trial court and particularly in the two paragraphs appearing on page 23 of the clerk's transcript.

### Authorities.

In support of the foregoing arguments we respectfully submit as authority for our position the following three cases, two of which were decided by this Court and one by the Eighth United States Circuit Court:

*Ashton v. Glaze*, 95 Fed. (2d) 427; 36 A. B. R. (N. S.) 356. Ninth Circuit Court, March 14, 1938:

“Appellant argues that the liquidator did not plead an estoppel, and that the pleadings in this respect do not support the decree. However, the case was apparently tried without objection on the theory estoppel was involved; and the pleadings may be deemed to be amended in conformity with the proof.

“On the appeal, for the first time, appellant attacks the decree on the asserted ground that Glaze note of ten thousand dollars had become barred by the statute of limitations. \* \* \* However, the statute of limitations was not pleaded, nor was the question otherwise raised below. The only issue presented to the trial court was that concerning the right of the liquidator on the basis of the facts related earlier in this opinion to retain the securities. \* \* \* There is no indication in the assignment of error or elsewhere of the intention of the appellant to claim the benefit of the statute. It is elementary that the defense of laches, or of the statute of limitations will not be considered when raised for the first time in an Appellate Court.”

*International Harvest Company v. Schmidt, et al.*,  
72 Fed. (2d) 300; 26 A. B. R. (N. S.) 68.  
Eighth Circuit Court, July 10, 1934:

“A second question has been raised on this appeal. It is set out in one of the assignments of error as follows: \* \* \* We decline to consider this assignment of error for the reason that it appears from the transcript of record that no such question as that presented by the assignment ever was submitted either to the Referee in Bankruptcy, or to the District Court. The only question passed on by the Referee and the District Court, and the only question submitted to them was whether the conditional sales contract involved in the case was lawfully acknowledged.”

*Clark Brothers v. Portex Oil Co.*, 115 Fed. (2d) 45; 43 A. B. R. (N. S.) 508. Circuit Court of Appeals, Ninth Circuit, June 28, 1940 (opinion written by Justice Mathews):

“Appellant contends that the proceedings should have been dismissed on the ground that the petition was not filed in good faith. That was not a ground of appellant’s motion. Not having been raised below, the question of good faith, here, attempted to be raised, will not be considered.”



### Conclusion.

We conclude by urging upon the Court that it should not have modified the judgment of the trial court in any manner and that if it still feels that such modification is proper, it should not now determine the rights of the parties under the declaration of trust. Further, we submit that under rule 27 of this Court, appellee is entitled to costs herein. This is mentioned because the clerk has construed this opinion as allowing costs to appellant.

Respectfully submitted,

MAURICE BLUMENTHAL,  
EDWARD GALLAUDET,  
SAMPSON MILLER,

*Attorneys for Appellee.*

### Certificate of Counsel.

I, Edward Gallaudet hereby state that in my judgment this petition for rehearing is well founded and I state that it is not interposed for delay.

EDWARD GALLAUDET.

No. 9561

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT //

---

FIRST PRESBYTERIAN CHURCH OF SANTA BARBARA,  
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rupt Estate of James Marwick, and JAMES MARWICK,

*Respondents and Appellees.*

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## MEMORANDUM IN REPLY TO PETITION FOR REHEARING.

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No. 9561

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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FIRST PRESBYTERIAN CHURCH OF SANTA BARBARA,  
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---

## MEMORANDUM IN REPLY TO PETITION FOR REHEARING.

---

### Introduction.

Appellant takes the position that appellee presents no reasonable basis for a reconsideration of the opinion of the court in his petition for a rehearing.



## The Points and Principles Upon Which the Appeal Was Determined Were Raised by the Appellant.

### I.

The statement by the appellee of the grounds of appeal stated by appellant as the basis for the preparation of the record answers the contention of appellee that a new ground constituted the basis for the court's opinion. The court in its opinion made the determination that there was consideration for the transfer; that the transfer occurred prior to the incurrence of the obligations of the transferor and that the transfer was valid; the court further defining appellant's rights under the transfer.

Appellant takes exception to the inference raised in appellee's petition that there were stipulations made during the trial which are not contained in the transcript. This is not the case. It is the positive assertion on the part of counsel for the appellant that every stipulation made during the course of the trial is contained in the transcript. Some stipulations were made after submission in the lower court, but they are also contained in the record on appeal. What counsel means by discussions we are at a loss to understand; we are not aware that a court does or may base its decision upon discussions as contrasted with stipulations or agreements in open court. It may further be pointed out that counsel does not in any way intimate what "discussions" or stipulations were omitted, or in what way these omissions he contends exist affect the case.

## II.

Under point “II” in the petition of appellee, he attempts to reargue the question of consideration again upon this petition. The argument has been previously made before this court, and has been determined against appellee. We do not feel that we should burden the court with a re-argument of the question to which it has given careful consideration and upon which it has rendered its opinion.

## III.

The third point set up in the petition presents a rather surprising contradiction. In the second point, appellee asserts that the so-called declaration of trust has been before the court from the inception of the determination of the issues involved in the case, being set up verbatim in the answer with an allegation that it constituted a prior transfer to the one sought to be avoided; then, in point three, appellee attempts to assert that the document is not before the court, and that the appellate court erred in interpreting it. Certainly a defendant is as much entitled to an adjudication of his rights in and to a piece of property as is a plaintiff, where he sets out his rights in his answer and asks that they be adjudicated. The opinion of this court does not state that the document was not before the court; the court said, “Its validity is not challenged by pleading or by proof.” Appellee is the party who wishes now to raise new points on appeal, and at such a time as this the attempt must of necessity be futile.

IV.

We have examined the authorities cited by appellee and, while we have no quarrel with the holdings of the cases, we fail to see anything in them that is contrary to the opinion of this court in the instant case.

**Conclusion.**

Appellant urges that no reasonable basis for a rehearing of this matter has even been suggested by the appellee and that the petition should be denied.

Respectfully submitted,

SCHAUER, RYON & McMAHON,  
ROBERT W. McINTYRE,

*Attorneys for Appellant.*



United States  
Circuit Court of Appeals

For the Ninth Circuit.

---

TOM WING ART, alias WING FOOK TOM, alias  
SHORTY YUEN,

Appellant,

vs.

WILLIAM A. CARMICHAEL, District Director  
of U. S. Immigration and Naturalization Ser-  
vice, District No. 20,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United  
States for the Southern District of California,  
Central Division

FILED

MAY - 7 1940

PAUL P. O'BRIEN,

CLERK



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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TOM WING ART, alias WING FOOK TOM, alias  
SHORTY YUEN,

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Upon Appeal from the District Court of the United  
States for the Southern District of California,  
Central Division





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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---

In the United States District Court for the Southern District of California, Central Division.

No. 14090-C

In the matter of TOM WING ART, alias WING FOOK TOM, alias SHORTY YUEN,

A resident Chinese Alien,  
ON HABEAS CORPUS.

### PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable United States District Judge now presiding in the United States District Court, in and for the Southern District of California, Southern Division:

Your Petitioner respectfully represents that he is an alien of the Chinese race, a native and citizen

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

of China, and that he last entered the United States on June 12, 1921 at the port of San Francisco, California; and that he has at all times since said entry been and now is a resident of the State of California.

That your Petitioner is unlawfully imprisoned, detained, confined and restrained of his liberty by Walter E. Carr, District Director of Immigration and Naturalization for the port of Los Angeles, at the Immigration Station at Terminal Island, County of Los Angeles, State and Southern District of California, Southern Division thereof; that said imprisonment, detention, confinement [2] and restraint are illegal, and that the illegality thereof consists in this, to-wit:

That it is claimed by the said District Director that your Petitioner is subject to *deportation* from and out of the United States upon the ground that: he has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute; that he has been found connected with the management of a house of prostitution; that he has been found managing a house of prostitution, or music or dance hall, or other place of amusement, or resort habitually frequented by prostitutes; or where prostitutes gather; and that the said District Director intends to deport your Petitioner away from and out of the United States to China.

That a hearing was had by your Petitioner on said charges and the testimony and records sub-

mitted to the Honorable Secretary of Labor, who issued a warrant for deportation of your Petitioner, under which warrant the said District Director of immigration is now imprisoning, detaining, confining and restraining your Petitioner, and unless this Honorable Court intervenes, intends and will deport your Petitioner from and out of the United States to China;

That it is claimed by the said District Director of immigration and the said Secretary of Labor that in all the proceedings had herein, your Petitioner was accorded a full and fair hearing; that the action of the said District Director of immigration and the said Secretary of Labor was within the powers and authorities conferred upon them by the various Acts of Congress regulating immigration and was taken and made by them in the proper exercise of the powers and discretions committed to them by statutes in such cases made and provided and in accordance with the regulations promulgated under the authorities contained in said Statutes;

[3]

But on the contrary, your petitioner, on his information and belief, alleges that the hearing and proceedings had herein and the action of said District Director of immigration and of the said Secretary of Labor was and is in excess of the powers and authorities conferred upon said District Director of immigration and said Secretary of Labor by the Act of Congress in such cases made and pro-



vided and is in excess of the authorities committed to them by the rules and regulations promulgated under said statutes and that the deportation of your petitioner, a person lawfully residing within the United States, from the United States to China on the ground that he was receiving, sharing in, or deriving benefit from the earnings of a prostitute; or he was connected with the management of a house of prostitution, or that he managed a house of prostitution, or music or dance hall, or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather, was and is an abuse of the authority committed to them by said Statutes, and in excess of powers conferred upon them, the said District Director of immigration and the said Secretary of Labor, in each of the following particulars:

Your Petitioner alleges that the evidence presented before the immigration inspector and submitted to the Secretary of Labor, and upon which evidence said Secretary of Labor has issued a warrant of deportation, which evidence is now hereby referred to with same force and effect as if set forth in full herein, contains absolutely no evidence that your Petitioner at the time of the issuance of the warrant of deportation in the above-entitled matter, to-wit, August 10, 1938, or at the time of his arrest, was receiving, sharing in, or deriving benefit from the earnings of a prostitute, or that he was connected with the management of any house of prostitution, or that he was managing a house of prosti-

tution, or music or dance hall, or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather; [4] or that he has ever received, shared in, or derived benefits from the earnings of a prostitute, or been connected with the management of a house of prostitution, or managed a house of prostitution, or music or dance hall, or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather; that petitioner during the course of the hearing had in the above-entitled matter before the Immigration Inspector was denied and refused the right to cross-examine adverse witnesses called by the immigration service in said procedure to the extent necessary in order to protect the interests of your petitioner;

That said action of the Director of Immigration and said Secretary of Labor in concluding that your petitioner was unlawfully within the United States and in ordering your petitioner's deportation by reason of said unlawful presence in the United States, as well as the refusal of said Director of Immigration and said Secretary of Labor to be guided by the evidence and the provisions of the Immigration Laws, providing for the offenses for which deportation may be ordered, and the said adverse action of said District Director and said Secretary of Labor in finding that your petitioner is unlawfully in the United States, was, your petitioner alleges, upon his information and belief, ar-

rived at and done in denying your petitioner a fair hearing and a consideration of his case to which he was entitled;

Your Petitioner further alleges that the evidence produced before the Immigration Inspector and submitted to the Secretary of Labor, and upon which evidence the said Secretary of Labor issued said warrant of deportation, which evidence is hereby referred to with same force and effect as if set forth in full herein, was of such a conclusive kind and character establishing that your petitioner on the date when the warrant of arrest was issued and at the time of his arrest was not "found receiving, sharing in, or deriving benefit from the earnings of a prostitute, or found connected with the management of a house of prostitution, or managing a house of [5] prostitution, or music or dance hall, or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather"; that the refusal of said District Director of Immigration and said Secretary of Labor to be guided by said evidence and the adverse action of said District Director of immigration and said Secretary of Labor was your petitioner alleges, upon his information and belief, arrived at and done in denying your petitioner a fair hearing and fair consideration of his case to which he was entitled; and that said action of said District Director of Immigration and said Secretary of Labor was in excess of the power and authority vested in them,



or either one of them, under the Immigration laws.

That your petitioner has not in his possession any of the immigration records, and he has been unable to secure copies thereof from the immigration authorities and your petitioner herewith alleges his willingness to incorporate and have considered as part and parcel of this petition the entire immigration records, and requests that the same may be attached hereto and made a part hereof and marked "Exhibit A", and presented to the Court at a hearing to be had on said petition.

That it is the intention of said District Director of immigration and of said Secretary of Labor to deport your petitioner away from and out of the United States to China in the very near future and unless this Court intervenes to prevent said deportation, your petitioner will be deprived of his right to reside and remain in the United States, to which right he claims he is legally entitled.

Wherefore, your petitioner prays that a Writ of Habeas Corpus issue herein as prayed for, directed to the said Walter E. Carr, District Director of immigration, commanding and directing him to hold the body of your petitioner within the jurisdiction of this Court and to present the body of your petitioner before this Court at a time and place to be specified in said order, together with the time and cause of his detention, so that the same may be inquired into to the end that your petitioner may be restored to his liberty and [6] go hence without day.

Dated: San Diego, California, October 2, 1939.

TOM WING ART,  
WONG FOOK TOM,

Petitioner.

WILLIAM H. WYLIE,  
H. P. LARSON BECK,  
HUGH A. SANDERS,

By WILLIAM H. WYLIE,  
Attorneys for Petitioner.

United States of America,  
State and Southern District of California,  
County of San Diego—ss.

The undersigned, being first duly sworn, deposes and says That he is the petitioner named in the foregoing petition; that the same has been read and explained to him and he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are herein stated on his information and belief, and as to those matters he believes it to be true.

TOM WING ART,  
WING FOOK TOM.

Subscribed and sworn to before me this 30th day of September, 1939.

[Seal] HUGH A. SANDERS,  
Notary Public in and for said County and State.

Received copy of the within this ..... day of  
..... 19.....

WALTER E. CARR,  
*Attorney for*

[Endorsed]: Filed Oct. 2, 1939. [7]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Good cause appearing therefor, and upon reading the verified petition on file herein;

It Is Hereby Ordered that Walter E. Carr, District Director of Immigration and Naturalization for the port of Los Angeles, appear before Honorable Geo. Cosgrave, Judge of the above-entitled Court on Monday, the 13th day of November, 1939, at the hour of 10 o'clock of said day, to show cause, if any he may have, why a writ of habeas corpus should not be issued herein as prayed for, and that a copy of this order be served upon said District Director, and a copy of the petition and said order be served upon the United States Attorney for this District, his representative herein; and

It Is Further Ordered that said Walter E. Carr, District Director of Immigration and Naturalization, as aforesaid, or whoever, acting under the orders of said District Director, or the [8] Secretary of Labor, shall have the custody of said Tom Wing Art, alias Wing Fook Tom, alias Shorty Yuen, or the master of any steamer upon which he may have been placed for deportation by said District Director, are hereby ordered and directed to retain said Tom Wing Art, alias Wing Fook Tom, alias Shorty Yuen, within the custody of said District Director and within jurisdiction of this Court, until its further order herein.

It Is Further Ordered that the said Tom Wing Art, alias Wing Fook Tom, alias Shorty Yuen, be



released upon bail pending a hearing of this order and the determination of the petition hereon filed, upon giving bond in the sum of three thousand Dollars, conditioned that the said Tom Wing Art, alias Wing Fook Tom, alias Shorty Yuen, shall comply with all orders made by the above-entitled Court, and shall surrender himself to the proper immigration official should his petition herein be dismissed, or the prayer thereof be denied.

Dated: Los Angeles, California, October 2nd, 1939.

GEO. COSGRAVE,

United States District Judge.

Received copy of the within this ..... day of  
.....19.....

WALTER E. CARR,

*Attorney for*

[Endorsed]: Filed Oct. 2, 1939. [9]

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[Title of District Court and Cause.]

HABEAS CORPUS

The President of the United States of America  
To Walter E. Carr, District Director of Immigration  
and Naturalization—Greeting:

You Are Hereby Commanded, that the body of Tom Wing Art, alias Wing Fook Tom, alias Shorty Yuen, by you restrained of his liberty, as it is said detained by whatsoever names the said Tom Wing

Art, alias Wing Fook Tom, alias Shorty Yuen, may be detained, together with the day and cause of being taken and detained, you have before the Honorable George Cosgrave, Judge of the United States District Court in and for the Southern District of California, at the court room of said Court, in the City of Los Angeles at 10:00 o'clock a. m., on the 13th day of November, 1939, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable Geo. Cosgrave, United States District Judge at Los Angeles, California, this 2nd day of October, A. D. 1939,

R. S. ZIMMERMAN,

Clerk.

By J. M. HORN,

Deputy Clerk.

#### UNITED STATES MARSHAL'S RETURN

..... District of....., ss:

Received the within writ the 2nd day of October, 1939, and executed same.

WALTER E. CARR,

By A. DEL GUERCIO.

Deputy Marshal.

[Endorsed]: Filed Nov. 13, 1939. [10]

[Title of District Court and Cause.]

RETURN TO WRIT OF HABEAS CORPUS

I, Walter E. Carr, District Director of U. S. Immigration and Naturalization Service, Los Angeles, California District No. 20, Respondent herein, for my return to writ of habeas corpus herein, do hereby certify that I am unable to produce the body of Tom Wing Art, alias Wing Fook Tom, alias Shorty Yuen before this Honorable Court for the reason that the said Tom Wing Art, alias Wing Fook Tom, alias Shorty Yuen was released on bond in the sum of Three Thousand Dollars (\$3,000.00) by order of this Honorable Court made and entered on October 2, 1939.

For further return to said writ I hereby certify that the true cause of the detention of the aforesaid Tom Wing Art, alias Wing Fook Tom, alias Shorty Yuen is the authority contained in a certain warrant of deportation duly and regularly issued on the 14th day of August, 1939 by Turner W. Battle, Assistant to the Secretary of Labor, after a hearing duly and regularly held before an Immigrant Inspector of the United States.

A copy of said warrant of deportation is attached hereto marked Exhibit "A".

Respectfully submitted,

WALTER E. CARR,

District Director of U. S. Immigration and Naturalization Service, Los Angeles, California, District No. 20, Respondent. [11]



EXHIBIT "A"

WARRANT—DEPORTATION OF ALIEN

United States of America

Department of Labor

Washington

No. 16539/208

55983/430

To: District Director of Immigration and Naturalization, Los Angeles, Calif.

Or to any Officer or Employee of the United States Immigration and Naturalization Service.

Whereas, from proofs submitted to me, Assistant to the Secretary, after due hearing before an authorized immigrant inspector, I have become satisfied that the alien Tom Wing Art or Tam Wing Fook or Tom Wing Fook or Wing Fook Tom alias Tommy Yen or Yuen alias Shorty Yen or Yuen, who entered the United States at San Francisco, California on the 12th day of June, 1921 is subject to deportation under section 19 of the Immigration Act of February 5, 1917, being subject thereto under the following provisions of the laws of the United States, to-wit: The Act of 1917, in that he has been found connected with the management of a house of prostitution; that he has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute; and that he has been found managing a house of prostitution, or music or dance hall or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather.

I, the undersigned officer of the United States, by virtue of the power and authority vested in me by and under the laws of the United States, do hereby command you to deport the said alien to China, at the expense of the appropriation, "General Expenses, Immigration and Naturalization Service, 1940", including the expenses of an attendant, if necessary. The alien may be permitted to depart, or ship foreign one way, without expense to the United States, to any country of his choice, except contiguous territory or adjacent islands, on consent of surety, such departure to be verified and considered a satisfactory compliance with the terms of the warrant, but alien should be advised that he will not, under existing law, be eligible to apply for entry to the United States until after one year following date of deportation, and then only if the Secretary of Labor has authorized him to apply for admission. Delivery of the alien and acceptance for deportation or departure in accordance with the foregoing will be deemed sufficient to cancel the outstanding delivery bond.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 14th day of August, 1939.

(s) TURNER W. BATTLE,  
Assistant to the Secretary of Labor.

Received copy of the within Return to Writ of Habeas Corpus this 13th day of November, 1939.

HUGH A. SANDERS,  
Attorney for Petitioner.

[Endorsed]: Filed Nov. 13, 1939. [12]

[Title of District Court and Cause.]

SUBSTITUTION OF PARTY

Whereas, Walter E. Carr, as District Director of United States Immigration and Naturalization Service at Los Angeles, California, District No. 20. has been named as Respondent in the above entitled proceeding, and

Whereas, the said Walter E. Carr is now deceased, having died on the 2nd day of January, 1940, and

Whereas, William A. Carmichael has been duly and regularly appointed as District Director of the United States Immigration and Naturalization Service at Los Angeles, California, District No. 20,

It Is Respectfully Moved that this Court order the substitution of said William A. Carmichael as Respondent in this proceeding in place of said Walter E. Carr, deceased.

Respectfully submitted,

WILLIAM A. CARMICHAEL,

District Director of U. S. Immigration and Naturalization Service, Los Angeles, California  
District No. 20, Respondent

It Is So Ordered this 12th day of February, 1940.

GEO. COSGRAVE,

Judge, United States District Court.

[Endorsed]: Filed Feb. 12, 1940. [14]



At a stated term, to-wit: The February Term, A. D. 1940, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 14th day of May in the year of our Lord one thousand nine hundred and forty.

Present:

The Honorable: Geo. Cosgrave, District Judge.

No. 14,090-C Crim.

In the Matter of Petition of

TOM WING ART,  
alias Wing Fook Tom  
alias Shorty Yuen

For a Writ of Habeas Corpus

This matter having come before the Court on November 13, 1939, for hearing on return to Writ of Habeas Corpus; and having been submitted on briefs to be filed 30 x 30 x 10, and the said briefs having been filed and duly considered by the Court, the Court orders as follows:

Petition for Writ of Habeas Corpus is denied, and petitioner is remanded to the custody of the immigration authorities. [15]

[Title of District Court and Cause.]

ORDER FIXING CUSTODY OF PETITIONER  
PENDING APPEAL.

That Petitioner, Tom Wing Art, alias Wing Fook Tom, alias Shorty Yuen, having filed his notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment or order of the above entitled court, made on the 14th day of May, 1940, denying Petitioner's application for discharge under a Writ of Habeas Corpus and remanding him to the custody of the Immigration Service of the United States, it is hereby ordered that all proceedings for the enforcement of said order against Petitioner be stayed, and that the custody of Petitioner be and remain in the above-entitled United States District Court pending the hearing and determination of said appeal; and

It Is Further Ordered, that said petitioner Tom Wing Art, may be released pending appeal upon giving bond in the sum of Three Thousand Dollars (\$3,000.00) to be approved by this Court, and that he remain within the United States, and render himself in execution of whatever judgment is finally entered herein at the termination of said Appeal.

Dated at Los Angeles, California, May 31st, A. D. 1940.

GEO. COSGRAVE,  
United States District Judge.

[Endorsed]: Filed May 31, 1940. [16]

[Title of District Court and Cause.]

NOTICE OF APPEAL.

To William A. Carmichael, District Director of U. S. Immigration and Naturalization Service, Los Angeles, California, District No. 20, Respondent and Appellee, herein, and to Ben Harrison, Esq., United States Attorney in and for the Southern District of California, appearing for said District Director:

The Petitioner, Tom Wing Art, alias Wing Fook Tom, alias Shorty Yuen, whose Petition for a Writ of Habeas Corpus was denied on the 14th day of May 1940 by the above entitled Court by order made in said cause, hereby gives notice thereof, and does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the said judgment or order, so made and entered herein, and from the whole thereof.

That the names and address of the office of Petitioner and appellant's Attorneys are, William H. Wylie, H. P. Larson Beck, and Hugh A. Sanders, 920 Bank of America Building, San Diego, California.

That the name and address of the office of Respondent's Attorney is: Ben Harrison, Esq., Federal Building, Los Angeles, California. [17]

Dated at San Diego, California, this 29th day of May, 1940.

WILLIAM H. WYLIE,  
H. P. LARSON BECK,  
HUGH A. SANDERS,

By WILLIAM H. WYLIE,  
Attorneys for Petitioner and Appellant.



Copy mailed May 31, 1940 to William A. Carmichael, District Director of U. S. Immigration and Naturalization Service, Federal Building, Los Angeles, Calif.

R. S. ZIMMERMAN,

Clerk.

By E. L. S.,

Deputy Clerk.

[Endorsed]: Filed May 29, 1940 [18]

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[Title of District Court and Cause.]

**COST BOND ON APPEAL.**

Know All Men By These Presents, That we, Tom Wing Art, as principal, and Henry Quin, Margaret Quin Kuey, Yee Sen On and Din Bo Yee, as sureties, are held and firmly bound unto the United States of America in the sum of Two Hundred and Fifty Dollars for the payment of which sum we hereby bind ourselves, heirs, successors, administrators and assigns.

Sealed with our seals and dated this 29th day of May, 1940.

Whereas, the Petitioner, Tom Wing Art, has prosecuted and appealed to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment, order or decree entered in said cause by the United States District Court for

the Southern District of California, Central Division, on the 14th day of May, 1940, against Petitioner, denying to him a Writ of Habeas Corpus and remanding him to the custody of the United States Immigration authorities;

Now, Therefore, the condition of this obligation is such [19] that if the above-named petitioner shall prosecute this appeal to effect and answer all costs if *they* fail to make good his plea, then this obligation to be void; otherwise, in full force and virtue.

Dated, May 29th, 1940.

TOM WING ART,

Principal.

HENRY QUIN,

MARGARET QUIN KUEY,

YEE SEN ON,

DIN BO YEE,

Sureties.

Address of all Sureties 920 Bank of America Bldg., San Diego, Calif.

State of California,

County of San Diego—ss.

Henry Quin, Margaret Quin Kuey, Yee Sen On and Din Bo Yee, the sureties whose names are subscribed to the within undertaking, each being sworn for himself, and herself says: I am a resident and freeholder in the County of San Diego, State of California, and am worth the sum in the undertaking specified, as the penalty thereof, over and

above all my just debts and liabilities, exclusive of property exempt from execution.

YEE SEN ON  
DIN BO YEE  
HENRY QUIN  
MARGARET QUIN KUEY

Subscribed and sworn to before me this 29th day of May, 1940.

[Seal]                      HUGH A. SANDERS,  
Notary Public in and for the County of San Diego,  
State of California.

[Endorsed]: Filed May 29, 1940. [20]

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## STIPULATION OF SURETIES IN COMPLIANCE WITH COURT RULES.

Henry Quin, Margaret Quin Kuey, Yee Sen On and Din Bo Yee, the sureties whose names are subscribed to the within and foregoing Bond and Undertaking, herewith submit themselves to the Jurisdiction of the above-entitled Court, and irrevocably appoint the Clerk of said Court as their Agent, upon whom any papers respecting their liability on the above, and foregoing bond or obligation, may be served and given, and their liability on said bond or obligation may be enforced on motion without the necessity of an independent action, all as provided by Rule 73, Subdivision C,



D and F thereof, of the Rules of the above-entitled Court.

HENRY QUIN,  
MARGARET QUIN KUEY,  
YEE SEN ON,  
DIN BO YEE,

Sureties.

United States of America,  
State of California,  
County of San Diego.—ss.

On this 29th day of May, A. D. 1940, before me, Hugh A. Sanders, a Notary Public, in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Tom Wing Art, Henry Quin, Margaret Quin Kuey, Yee Sen On and Din Bo Yee, each and all, personally known to me to be the persons whose names are subscribed to the within and foregoing Bond, and the above Stipulation, and each and every one of said persons acknowledged to me that he had or she had subscribed their name thereto. [21]

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year in this Certificate first above written.

[Seal]                      HUGH A. SANDERS,  
Notary Public, in and for the County of San Diego,  
State of California.

[Endorsed]: Filed May 29, 1940. [22]

[Title of District Court and Cause.]

STIPULATION AND ORDER RESPECTING  
WITHDRAWAL OF IMMIGRATION  
RECORD.

It Is Hereby Stipulated and agreed between the attorneys for Petitioner and Appellant herein, and the attorney for the Respondent and Appellee herein, that the original Immigration Record in evidence, together with the Warrant of Deportation, in evidence and considered as part and parcel of the Petition for the Writ of Habeas Corpus upon the hearing thereof in the above entitled matter, may be withdrawn from the files of the Clerk of the above entitled Court and filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, there to be considered as a part of the record on appeal in the above entitled case with the same force and effect as if embodied in the Transcript of the record and so certified by the Clerk of the above-entitled Court.

Dated at Los Angeles, California, this 31 day of May, 1940.

BEN HARRISON,  
United States Attorney,  
By RUSSELL K. LAMBEAU  
Assistant United States  
Attorney

WILLIAM H. WYLIE  
Attorney for Petitioner herein.

## ORDER.

Upon reading and filing of the foregoing stipulation, it is hereby ordered that said Immigration Record and the Warrant of Deportation therein referred to may be withdrawn from the office of the Clerk of this Court and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, said withdrawal to be made at the time the record on appeal herein is certified by this Court.

Dated at Los Angeles, California, this 31st day of May, A. D. 1940.

GEO. COSGRAVE

United States District Judge.

[Endorsed]: Filed May 31, 1940. [24]

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[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH  
APPELLANT INTENDS TO RELY

Comes now the above named appellant, Tom Wing Art, by his attorneys, Hugh Sanders, H. P. L. Beck and William H. Wylie, and states that the points upon which he, the appellant, intends to rely in this appeal are, as follows:

1. That the District Court erred in dismissing the Writ of Habeas Corpus and remanding appellant to the Immigration authorities;
2. That the District Court erred in sustaining



the Secretary of Labor in directing the deportation of appellant from the United States;

3. That the record contains no evidence tending to establish that appellant “received, shared in or derived benefit from the earnings of a prostitute”;

4. That the record contains no evidence tending to establish that appellant was “found connected with the management of a house of prostitution”;

5. That the record contains no evidence tending to establish that applicant was “found managing a house of prostitution, or music or dance hall or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather”; [25]

6. That the record contains no evidence tending to establish that appellant has committed any deportable offense;

7. That the record contains no evidence that appellant was “found connected with the management of a house of prostitution” or “found managing a house of prostitution, etc.” at time the warrant of arrest was issued by Secretary of Labor or at time of his arrest;

8. That the record contains no evidence tending to establish that appellant has committed any of the deportable offenses set forth in the Warrant of arrest or contained in the Warrant of Deportation issued by Secretary of Labor under which the said Secretary of Labor seeks to deport appellant from the United States.

9. That the order of the United States District Court sustaining the warrant of deportation issued

by Secretary of Labor directing the deportation of appellant is against the law.

Respectfully submitted,

WILLIAM H. WYLIE

H. P. LARSON BECK

HUGH A. SANDERS

By WILLIAM H. WYLIE

Attorneys for Appellant,

Tom Wing Art.

Received copy of the above and within statement of Points this 31st day of May 1940.

BEN HARRISON,

U. S. Atty.

By RUSSELL K. LAMBEAU,

Asst. U. S. Atty.

[Endorsed]: Filed May 31, 1940. [26]

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[Title of District Court and Cause.]

DESIGNATION OF THE PORTIONS OF THE  
RECORD, PROCEEDINGS AND EVIDENCE  
TO BE CONTAINED IN THE  
RECORD ON APPEAL.

To the Clerk of the above-entitled Court:

Please make copies of the following papers in the above entitled cause to be used in preparing Transcript or Record on Appeal:

1. Petition for Writ of Habeas Corpus,
2. Order to Show Cause, and Writ of Habeas Corpus.

3. Respondent's Return to Writ of Habeas Corpus.

4. Court's Memorandum and Order of May 14th, 1940, dismissing the Writ and remanding Petitioner.

5. Order fixing custody of Appellant pending Appeal.

6. Notice of Appeal.

7. Stipulation and order regarding Immigration Record.

8. Cost Bond on Appeal.

9. Citation on Appeal.

10. Designation of the portions of the Record, Proceedings and Evidence to be contained in the record on appeal.

11. Clerk's Certificate.

Dated at Los Angeles, California, May 31st, 1940.

WILLIAM H. WYLIE,

H. P. LARSON BECK and

HUGH A. SANDERS

By WILLIAM H. WYLIE

Attorneys for Petitioner and  
Appellant.

Received copy of the above and within this 31st  
day of May 1940.

BEN HARRISON,

United States Attorney

By RUSSELL K. LAMBEAU,

Asst. U. S. Atty.

[Endorsed]: Filed May 31, 1940. [27]



[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing pages, numbered from 1 to 27, inclusive, contain full, true and correct copies of Petition for Writ of Habeas Corpus; Order to Show Cause; Writ of Habeas Corpus; Return to Writ of Habeas Corpus; Substitution of Party Respondent; Order Denying Writ and Remanding; Order Fixing Custody of Petitioner Pending Appeal; Notice of Appeal; Cost Bond on Appeal; Stipulation and Order Respecting Withdrawal of Immigration Record; Statement of Points on Which Appellant Intends to Rely, and Designation of Contents of Record on Appeal, which together with the Original Immigration Record transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I Do Further Certify that the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to \$5.30, and that said amount has been paid me by the Appellant herein.

Witness my hand and the Seal of the District Court of the United States for the Southern District of California, this 5th day of July, A. D. 1940.

[Seal]

R. S. ZIMMERMAN,

Clerk

By EDMUND L. SMITH

Deputy Clerk.

[Endorsed]: No. 9564. United States Circuit Court of Appeals for the Ninth Circuit. Tom Wing Art, alias Wing Fook Tom, alias Shorty Yuen, Appellant, vs. William A. Carmichael, District Director of U. S. Immigration and Naturalization Service, District No. 20, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed July 6, 1940.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

#9564

On Habeas Corpus

TOM WING ART, alias WING FOOK TOM,  
alias SHORTY YUEN,

Appellant,

vs.

WILLIAM A. CARMICHAEL, District Director  
of Immigration,

Appellee.

AFFIDAVIT OF SERVICE BY  
MAIL-1013a CCP

State of California

County of San Diego—ss.

Elizabeth S. Landweer, being sworn, says: That affiant is a citizen of the United States, over the age of eighteen, a resident of the County of San Diego, and is not a party to the above-entitled action; that affiant's business address is 920 Bank of America Building, San Diego, California; that on July 3, 1940, affiant served the within Statement of Points On Which Appellant Intends to Rely by placing a true copy thereof in an envelope addressed to Ben Harrison, U. S. Attorney, at his business address, "Federal Post Office Building, Los Angeles, California", and by then sealing and depositing said envelope, with postage thereon fully



prepaid, in the United States Mail at San Diego, California, where is located the office of the attorneys for the person by and for whom said service was made. That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

ELIZABETH S. LANDWEER

Subscribed and sworn to before me this 3rd day of July, 1940.

[Seal]

HUGH A. SANDERS

Notary Public in and for said  
County and State.

---

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH  
APPELLANT INTENDS TO RELY

Comes now the above-named appellant, Tom Wing Art, by his attorneys, Hugh Sanders, H. P. L. Beck and William H. Wylie, and states that the points upon which he, the appellant, intends to rely in this appeal are, as follows:

1. That the District Court erred in dismissing the Writ of Habeas Corpus and remanding appellant to the Immigration authorities;

2. That the District Court erred in sustaining the Secretary of Labor in directing the deportation of appellant from the United States;

3. That the record contains no evidence tending to establish that appellant “received, shared in or derived benefit from the earnings of a prostitute”;

4. That the record contains no evidence tending to establish that appellant was “found connected with the management of a house of prostitution”;

5. That the record contains no evidence tending to establish that applicant was “found managing a house of prostitution, or music or dance hall or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather”;

6. That the record contains no evidence tending to establish that appellant has committed any deportable offense;

7. That the record contains no evidence that appellant was “found connected with the management of a house of prostitution” or “found managing a house of prostitution, etc.” at time the warrant of arrest was issued by Secretary of Labor or at time of his arrest;

8. That the record contains no evidence tending to establish that appellant has committed any of the deportable offenses set forth in the Warrant of arrest or contained in the Warrant of Deportation issued by Secretary of Labor under which the said Secretary of Labor seeks to deport appellant from the United States.

9. That the order of the United States District Court sustaining the warrant of deportation issued

by Secretary of Labor directing the deportation of appellant is against the law.

Respectfully submitted,

WILLIAM H. WYLIE

H. P. LARSON BECK

HUGH A. SANDERS

By WILLIAM H. WYLIE

Attorneys for Appellant,

Tom Wing Art

Received a copy of the within this.....day of  
July, 1940.

---

Attorney for Appellee.

[Endorsed]: Filed July 6, 1940. Paul P. O'Brien,  
Clerk.

---

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF SERVICE BY  
MAIL-1013a CCP

State of California

County of San Diego—ss.

Elizabeth S. Landweer, being sworn, says: That affiant is a citizen of the United States, over the age of eighteen, a resident of the County of San Diego, and is not a party to the above-entitled action; that affiant's business address is 920 Bank of America Building, San Diego, California; that on July 3, 1940, affiant served the within Designation of the Portions of the Record, Proceedings and



Evidence to Be Contained in the Record On Appeal by placing a true copy thereof in an envelope addressed to Ben Harrison, U. S. Attorney, at his business address, "Federal Post Office Building, Los Angeles, California", and by then sealing and depositing said envelope, with postage thereon fully prepaid, in the United States Mail at San Diego, California, where is located the office of the attorneys for the person by and for whom said service was made. That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

ELIZABETH S. LANDWEER

Subscribed and sworn to before me this 3rd day of July, 1940.

[Seal]

HUGH A. SANDERS

Notary Public in and for said  
County and State.

---

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF THE PORTIONS OF THE  
RECORD, PROCEEDINGS AND EVIDENCE  
TO BE CONTAINED IN THE  
RECORD ON APPEAL.

To the Clerk of the above-entitled Court:

Please make copies of the following papers in the above entitled cause to be used in preparing Transcript or Record on Appeal:

1. Cost Bond on Appeal
2. Designation of Record on Appeal
3. Notice of Appeal
4. Order to Show Cause
5. Order Denying Writ and Remanding
6. Order Fixing Custody of Petitioner Pending Appeal
7. Petition for Writ of Habeas Corpus
8. Return to Writ of Habeas Corpus, Exhibit "A"—Warrant of Deportation of Alien
9. Statement of Points on Which Appellant Intends to Rely
10. Stipulation and Order Respecting Withdrawal of Immigration Record
11. Substitution of Party Respondent
12. Writ of Habeas Corpus.

Dated, San Diego, California, July 2, 1940.

WILLIAM H. WYLIE

H. P. LARSON BECK

HUGH A. SANDERS

By WILLIAM H. WYLIE

Attorneys for Appellant.

Received a copy of the within this.....day of  
July, 1940.

---

Attorney for Appellee

[Endorsed]: Filed July 6, 1940. Paul P. O'Brien,  
Clerk.





No. 9564

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

TOM WING ART, alias WING FOOK  
TOM, alias SHORTY YUEN,

*Appellant,*

vs.

WILLIAM A. CARMICHAEL, Dis-  
trict Director of U. S. Immigration  
and Naturalization Service, District  
No. 20,

*Appellee.*

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Upon Appeal from the District Court of the United  
States for the Southern District of California,  
Central Division.

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Appellant's Opening Brief

WILLIAM H. WYLIE,  
H. P. LARSON BECK,  
HUGH A. SANDERS,  
920 Bank of America Bldg.,  
San Diego, California,  
*Attorneys for Appellant.*

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FILED

AUG 30 1940

PAUL P. O'BRIEN,



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## STATEMENT OF THE QUESTIONS INVOLVED.

1. Whether the facts, as found by the examining inspector and the Board of Review are sufficient to establish that appellant is an alien "found connected with the management of a house of prostitution" or "who manages . . . a house of prostitution," deportable offenses denounced in clauses 6 and 7, Section 19 of the Immigration Act of February 5, 1917;

2. Whether such facts are sufficient to establish that appellant has "received, shared in or derived benefit from any part of the earnings of a prostitute";

3. The power and authority vested in the Secretary of Labor by the provisions of the Immigration Act of February 5, 1917, to deport an alien, lawfully admitted into the United States and permanently residing therein, for acts committed subsequent to such entry and years prior to the commencement of these deportation proceedings and the record establishes that such alien at present time and for some years prior thereto has engaged in or been connected with the denounced activities.





United States  
Circuit Court of Appeals

For the Ninth Circuit

---

TOM WING ART, alias WING FOOK  
TOM, alias SHORTY YUEN,  
*Appellant,*

vs.

WILLIAM A. CARMICHAEL, Dis-  
trict Director of U. S. Immigration  
and Naturalization Service, District  
No. 20,  
*Appellee.*

---

No. 9564

Appellant's Opening Brief

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OPENING STATEMENT

This is an appeal from the order of the District Court of the United States in and for the Southern District of California denying appellant's Petition for a Writ of Habeas Corpus and remanding appellant to the custody of the immigration authorities.

The original Petition for Writ of Habeas Corpus together with an Order to Show Cause why such Writ should not be granted was presented to the Honorable George Cosgrave, Judge of the District Court of the

United States in and for the Southern District of California; said order to show cause was made by said United States District Court; that thereafter the matter was set for hearing upon the Government filing its return to the Writ; the matter was heard upon written briefs and after due consideration the Court made its order denying said Writ as stated above.

### **THE FACTS**

Appellant accepts the findings of the Board of Review and the examining inspector as the facts involved in present proceedings, a resume of such facts is as follows:

Appellant concedes the facts to be as stated in the summary prepared by the examining inspector and set forth in the memorandum filed by the Board of Review in the course of the proceedings had herein before the Secretary of Labor.

These findings relate to three establishments where prostitution was practiced; the Government contending that appellant was "managing," or was connected with the management, of the immoral business conducted in each of these establishments. The name of these establishments and the time during which the Government contends that appellant was such manager, or was connected with the management of the business conducted therein, are as follows:

DE LUXE ROOMS—November, 1932, to January 28, 1934.

ARDMORE ROOMS—July, August and September, 1936.

ISLAND HOTEL—First part of January, 1937.

Appellant will segregate the facts found by the examining inspector in his summary and those found by the Board of Review in their memorandum and rearranging them in accordance with their relationship toward each of these establishments.

#### DE LUXE ROOMS:

The Board of Review found:

That Lorriane Gordon testified “that during November, 1932, she obtained employment as a prostitute in the De Luxe Rooms and worked there as a prostitute,” for two weeks; that a blonde woman named “Jean,” during that period was the “landlady” and who “was then sharing the same bedroom in that establishment with the alien.”

That during June, 1933, she returned to work at the De Luxe Rooms as a “prostitute”; “that the alien was not then living in the De Luxe Rooms but that he called almost every night and at intervals ‘checked’ with Jean Alvarada, the new ‘landlady’, the amount of money taken in by the establishment and received a share of that money”;

That about the first of November, 1933, while in the De Luxe Rooms, the alien suggested that she (Lorriane Gordon) serve as “landlady in charge” of the De Luxe Rooms for him and that after about two conversations regarding the details she took charge of the activities at the De Luxe Rooms as a subordinate of this alien;



that Lorriane Gordon testified that she and this alien agreed that the net proceeds of the business of the De Luxe Rooms were to be divided equally between them and in accordance with that agreement she worked for the alien until the latter part of January, 1934, . . . when she left his employment in the De Luxe Rooms. (Memorandum filed by Board of Review; Immigration Record.)

The examining inspector in his summary found:

That Lorriane Gordon testified that during November, 1932, she worked two weeks at the De Luxe Rooms as a prostitute; that the "landlady" at that time, "and Lorriane Gordon's immediate superior, was a blonde woman named "Juean", surname not remembered and present whereabouts unknown, who was living in concubinage and sharing the same bedroom in that establishment with the subject alien." (Immigration Record, page 244.)

#### ARDMORE ROOMS:

The Board of Review found:

That Lorriane Gordon testified "that several months after she went to work at the De Luxe Rooms in June, 1933, Mrs. Alvarado moved to the Ardmore Rooms on 4th Avenue and for a short time functioned as landlady of both houses . . . she also testified that during this period the alien spent much time at the Ardmore Rooms and on several occasions she, when working there as a prostitute, saw Mrs. Alvarado and the alien dividing the proceeds of the prostitution business conducted at that place";

That Norma Bondley Lickert testified “that for about three months beginning in July, 1936, she acted as ‘landlady’ of the Ardmore Rooms during the temporary illness of the regularly employed ‘landlady,’ a woman named Dorothy.” It was according to Miss Lickert’s testimony agreed between her and Dorothy that she, Miss Lickert, “should receive the said Dorothy’s share of the net proceeds being one-third of the total”; that Dorothy instructed her to collect from the prostitutes all the money received by them and to deposit that money in a desk in one of the rooms until the close of the working day or night and then to re-distribute to the prostitutes the portions of their receipts to which in accordance with the house’s custom they were entitled.” Dorothy said “that the remainder of that was to be retained pending a final accounting with Georgia Buck, Dorothy’s employer”; “Dorothy told her Georgia and Tom Quin were associated in the operation of several houses of prostitution and that the alien was Tom Quin’s collector.”

That Miss Lickert testified “that Dorothy informed her that the alien was the ‘boss’ and that he himself represented himself to be the ‘boss’ of the business in the Ardmore Rooms on one occasion after having suggested that she become his mistress”; that “the alien lived in a small building in the yard behind the two story building on the second floor of which the Ardmore Rooms were located”; “that alien possessed a key which fitted a lock in the rear entrance door of the Ardmore Rooms”; “that he called frequently in those rooms, used

the telephone there, and in the presence of Miss Lickert he on one occasion reprimanded a prostitute who seemed to appear to him to be neglecting her work"; "that his general demeanor was that of one in a position of authority, superior to the 'landlady' "; "that Dorothy instructed her to pay over to this alien the house's division of the business when he should call for it and that on one occasion during August, 1936, he did call for that purpose and that he obtained from her the key to the desk where the money was kept and took the money." (Memorandum filed by Board of Review; Immigration Record.)

The examining inspector in his summary found:

That Miss Lickert testified that "during those three months she heard Dorothy and others talking of Tom Quin and his interests from time to time, but did not see him"; "that the alien reprimanded and issued verbal instructions in the presence of her, Miss Lickert, to at least one prostitute who was, in his opinion, neglecting her work, and his general demeanor was that of one vested with authority superior to the 'landlady' "; "that Dorothy instructed her, Miss Lickert, to surrender to this alien the 'house's' division of the proceeds of the business, if he should call for it, and once, during August, 1936, he did call for that purpose, obtained from her the key to the desk where the money was kept, and took it. ON ALL OTHER OCCASIONS DURING THAT THREE MONTHS GEORGIA BUCK COLLECTED FOR THE 'HOUSE' AND DID THE 'CHECKING UP' WITH MISS LICKERT." (Immigration Record, page 245.)



## ISLAND HOTEL:

The Board of Review found:

That Lorriane Gordon testified that “during the first part of 1937, she worked as a prostitute for a short time in the ‘Island Hotel’ when the ‘madame’ in that place was a woman named ‘Carmen’ ”; “she gave it as her understanding that the alien and Georgia Buck were the operators of the establishment and the employers of ‘Carmen’.” (Memorandum filed by Board of Review, Immigration Record.)

The Board of Review summarized the testimony given by Wyman E. Ward, William E. Ash, Herbert J. Collins, called by the Government in rebuttal, in the following language:

“The four additional witnesses who were called by the examining inspector: Wyman E. Ward, William E. Ash, Herbert J. Collins and Steve Reto, furnished testimony which clearly preponderates to establish that this alien has been actively associated with the businesses of gambling and commercialized vice in San Diego throughout virtually all the time of his residence in that city and tends to corroborate the direct evidence furnished by the witnesses Mrs. Gordon and Miss Lickert that this alien has been deriving benefits from the earnings of prostitutes and connected with the management of places of prostitution.” (Memorandum filed by Board of Review; Immigration Record.)

The examining inspector in his summary of the evidence found:

That WYMAN E. WARD testified “that Tom Quin was generally believed to be engaged in the business of

prostitution and to control gambling among the Chinese people of San Diego; . . . that he has seen the alien in Georgia Buck's place; that Rita Morgan was an old-time prostitute . . . ; that she was believed to operate the De Luxe Rooms immediately prior to her arrest there during June, 1932; that he knew as a matter of police history that Rita Morgan and the alien had been found in bed in one of the rooms of the Mitchell Hotel." (Immigration Record, page 250.)

The examining inspector in his summary of the evidence found:

That WILLIAM E. ASH testified he had been an employee of Virgil Bruschi, an old time resident in San Diego's Chinatown where he conducted a grocery store; that he, Ash, had worked in this store for many years prior to 1937; he knew Tom Quin intimately for many years; during the last ten years of his life Tom Quin was known as "The Mayor of Chinatown," had control of the gambling and control of prostitution; that the alien was rumored to be associated with Tom Quin and to be Tom Quin's body guard; . . . that he was acquainted with Georgia Buck and her establishment, the Regal Rooms, a house of prostitution; "that it was generally believed that Georgia Buck and Tom Quin were associated in the business of prostitution and that she acted as collector for him;" . . .

That numerous times during a period of eight years he saw the subject alien and Rita Morgan together; that several lottery gambling establishments were reputed to be owned by Tom Quin. . . . (Immigration Record, page 250.)

The examining inspector in his summary of the evidence found:

That HERBERT J. COLLINS “testified to the effect . . . that during 1927 or 1928 when he was a taxi-cab driver—he transported the alien in a taxi-cab to the De Luxe Rooms . . . two or three times; that he believed Rita Morgan to be the proprietor of the De Luxe Rooms; that he had seen Rita Morgan and the alien together at the Ferris and Ferris Drug Store at 5th and Market Street, San Diego; that he had heard that Rita Morgan was the alien’s mistress; that he was not acquainted with Tom Quin, but had heard persons refer to him as ‘The Mayor of Chinatown’.” (Immigration Record, page 251.)

The examining inspector in his summary of the evidence found:

That STEVE RETO testified that he had, some six or seven years prior to May, 1938, been employed by Tom Quin as manager of one of his gambling houses; that subject alien was also employed by Tom Quin in same gambling house some six or seven years prior to 1938; that he frequently, as messenger for Tom Quin, went in search for subject alien; lots of times located him at the Ardmores Rooms (upstairs in the hotel part, where prostitution was practiced); that he believed the subject alien had a room in the “Ardmores” because he found him there so many times. (Immigration Record, Page 251.)



## THE ISSUES

The principal issues in this appeal are concisely set forth in the "Statement of Points" on which Appellant intends to rely, especially as to:

1. That the record contains no evidence tending to establish that appellant "received, shared in or derived benefit from the earnings of a prostitute";

2. That the record contains no evidence tending to establish that appellant was "found connected with the management of a house of prostitution";

3. That the record contains no evidence tending to establish that applicant was "found managing a house of prostitution, or music or dancehall or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather";

4. That the record contains no evidence tending to establish that appellant has committed any deportable offense;

5. That the record contains no evidence that appellant was "found connected with the management of a house of prostitution" or "found managing a house of prostitution, etc." at time the warrant of arrest was issued by Secretary of Labor or at time of his arrest;

6. That the record contains no evidence tending to establish that appellant has committed any of the deportable offenses set forth in the Warrant of arrest or contained in the Warrant of Deportation issued by Secretary of Labor under which the said Secretary of Labor seeks to deport appellant from the United States.

## POINTS AND AUTHORITIES

### Power and Authority of the Secretary of Labor to Deport a Resident Alien.

The present proceedings were brought by the Secretary of Labor under the powers and authorities conferred upon him by the Immigration Act of February 5, 1917, Section 19, clauses 6 and 7, which provide:

“any alien who is hereafter . . . found an inmate or connected with the management of a house of prostitution . . . or shall receive, share in or derive benefit from any part of the earnings of any prostitute . . . shall upon the warrant of the Secretary of Labor, be taken into custody and deported. . . .”

#### Clause 6.

“any alien who manages or is employed by, in or in connection with any house of prostitution . . . shall upon the warrant of the Secretary of Labor, be taken into custody and deported. . . .”

#### Clause 7.

The examining inspector and the Board of Review both

“agree that the third of the charges in the warrant of arrest; that the alien is an inmate of a house of prostitution, should be withdrawn as not established by the evidence.”

The Secretary of Labor has made no charge that appellant is, or was, “employed in, by or in connection with any house of prostitution.”

The power and authority of the Secretary of Labor to deport a resident alien out of and away from the United States is purely statutory and to justify an order deporting a resident alien the burden of proof is upon the Government to establish that the resident alien has committed an offense denounced by Congress as ground for such deportation.

Section 221, Title 8, Aliens and Citizenship, U. S. C. A. provides:

“Whenever any alien attempts to enter the United States the burden of proof shall be upon such alien to establish that he is not subject to exclusion under any provision of the Immigration Laws; and in any deportation proceedings against any alien the burden of proof shall be upon such alien to show that he entered the United States lawfully, and the time, place and manner of such entry into the United States.”

“This section (Section 221, *supra*) however, has no application to the case under consideration, for the appellant here was charged with an offense alleged to have been committed after a lawful entry into the United States. We believe the true rule to be that, in proceedings involving the right of the United States to deport an alien whose entry into the United States in the first instance was lawful, the alien has the burden of establishing his right to remain, but, where the right to deport is based on the misconduct of the alien subsequently to his entry, the presumption of innocence obtains, and the burden is upon the Government to establish the fact of guilt.”

*Werrman v. Perkins*, 79 Fed. (2) 467; 7th cir.



The Government concedes that appellant was lawfully admitted to enter the United States, at the Port of San Francisco, California, on June 12, 1921, as a son of a Chinese Government Official and since 1922 has resided continuously at San Diego, California. (Memorandum filed by Board of Review, Immigration Record.)

The Secretary of Labor, in the exercise of this power and authority must also comply with certain laws and legal principles generally accepted by our judicial system.

“If person sought to be deported is not afforded a full, adequate hearing, in which findings are supported by substantial evidence, or if the law is mistakenly applied in deportation proceedings, judicial relief may be had by the writ of Habeas Corpus.”

*Bata Shoe Co. v. Perkins*, 33 Fed. Supp. 508.

“There was also a protest against the efforts made to prevent the deportation of the Katz Brothers wherein it is averred that ‘It has been a matter of common knowledge that they were profiting by the earnings of a prostitute.’

“These affidavits and protests contain the strongest showing made against Joseph Katz respect his alleged receiving of the earnings of a prostitute or prostitutes. The very best that can be made out of the testimony, and the whole thereof contained in the record is that it is wholly hearsay and based upon common repute in the vicinity; the affiant generally asservating upon information and belief. There is practically no substantive

testimony of fact. Locally—that is, in the State of California—the fact that a house is being conducted as a house of ill-fame, may be shown by common repute; but there is no rule of which we are aware by which the ownership or management of such a house may be so proven.”

Katz v. Commissioner, 245 Fed. 316; 9th Cir.

Appellant submits that no matter how reprehensible the Secretary of Labor may think his conduct is, nevertheless, if this misconduct is not denounced by Congress and the Secretary of Labor directed to deport such alien upon proof of guilt, the Secretary of Labor is without power to make any lawful order for his deportation.

The intent and purpose of the provisions of Section 19, Immigration Act of February 5, 1917, is to remove from the United States certain well defined classes of alien whose acts and conduct appear to Congress to be detrimental to the general welfare of the United States; it operates upon those aliens that fall within those classes. The Immigration Act of 1917 does not provide for the deportation of aliens who “have been actively associated with the businesses of gambling and commercialized vice,” or for aliens who are employed by those associated with gambling or commercialized vice.

“The power to regulate and suppress brothels and bawdy-houses, which includes the regulation of leasing houses or buildings for such purposes, is police in character, and in general, is exercised by the states and local municipalities, rather than by

the general government; and the statute in question manifests no intendment to encroach upon or interfere with such regulations. It deals, as we have seen, with certain alien classes, and provides for the deportation of aliens comprised thereby, and, considering the spirit and purpose of the statute, we think that there is no intendment to include an alien landlord, who leases to a prostitute the house in which she lives and practices prostitution and receive from her the rental thereof.”

Katz v. Commissioner, 245 Fed. 316; 9th. Cir.

The power and authority of the Secretary of Labor to deport aliens out of and away from the United States are limited to such aliens as are members of one of the various classes expressly set forth and defined by the acts of Congress. Congress has not seen fit to vest the Secretary of Labor with power and authority to deport aliens who “have been actively associated with the businesses of gambling and commercialized vice”; the same is true as to those aliens who own buildings and lease them to prostitutes for the purpose of conducting such immoral business, and those aliens who receive a part of a prostitute’s earnings for services rendered or merchandise delivered to such prostitute.

## **MANAGEMENT**

The Government contends that appellant was “found managing a house of prostitution” and that he was “found connected with the management of a house of prostitution.” The examining inspector and the Board of Review do not designate in their findings any partic-



ular house of prostitution that the Government claims appellant managed or was connected with the management thereof; and the findings failed to indicate the time or times during which it is claimed appellant managed or was connected with the management of any house of prostitution.

Appellant contends that the facts found by the examining inspector and the Board of Review are insufficient, in law and in fact, to sustain the conclusion of the Secretary of Labor that "appellant has been found connected with the management of a house of prostitution," or that he "has been found managing a house of prostitution."

The "facts," so far as material to the issues relating to "management," are as follows:

1. That during June, 1933, appellant called almost every night at De Luxe Rooms and "at intervals 'checked' with the 'landlady' the amount of money taken in by the establishment and received a share of that money";

2. That about November 1, 1933, Lorriane Gordon, the witness, "took charge of the activities at the De Luxe Rooms as a 'subordinate' of appellant"; that she testified that she and this alien agreed that the net proceeds of the business of the De Luxe Rooms were to be divided equally between them and in accordance with that agreement she worked for the alien until the latter part of January, 1934";

3. That in June, 1933, appellant "spent much time at the Ardmore Rooms and on several occasions Lorriane Gordon, when working there as a prostitute, saw

the 'landlady' and the alien dividing the proceeds of the prostitution business conducted at that place";

4. That during July, August and September, 1936, Miss Lickert acted as 'landlady' at the Ardmore Rooms, the regular 'landlady,' Dorothy, being ill; that Dorothy told her "that the balance of the daily receipts of the prostitution business, after distributing to the prostitutes their share or portion thereof" . . . "was to be retained pending a final accounting with Georgia Buck, her employer" . . . "that Georgia Buck and Tom Quin were associated in the operation of several houses of prostitution and that the alien was Tom Quin's collector";

5. That Dorothy instructed her, Miss Lickert, "to pay over to this alien the house's division of the business when he should call for it and that on one occasion during August, 1936, he did call for that purpose and obtained from her the key to the desk where the money was kept and took the money"; that "on all other occasions during that three months Georgia Buck collected for the 'house' and did the 'checking up' with Miss Lickert" (examining inspector's summary, supra);

6. That appellant, in the presence of Miss Lickert, "on one occasion reprimanded a prostitute who seemed to appear to him to be neglecting her work"; "that the alien reprimanded and issued verbal instructions in the presence of Miss Lickert to at least one prostitute who was, in his opinion, neglecting her work";

7. That Dorothy informed Miss Lickert "that the alien was the 'boss,' and that he himself represented

himself to be the 'boss' of the business in the Ardmore Rooms on one occasion after suggesting that she become his mistress";

8. The opinion of Miss Lickert that appellant's general demeanor was that of one vested with authority superior to the 'landlady'."

Appellant will discuss later in this brief the question whether "checking" with the "landlady," or manager in charge of the business conducted in a house of prostitution, "the amount of money taken in by the establishment and receiving a share of that money," as collector for another, is subject to deportation under clause 6, Section 19, Immigration Act of February 5, 1917, as an alien "found receiving, sharing in or deriving benefit from the earnings of a prostitute." Appellant for the present, addressing his argument solely to the question whether the facts here presented constitute the deportable offense of managing, or being connected with the management, of a house of prostitution.

Before taking up the main point, appellant directs the Court's attention to the sixth, seventh and eighth clauses above set forth, and submits that the matters therein stated should be disregarded in that the same are but the opinion or deduction of the witness and the record does not contain evidence establishing the necessary data to support such opinion or deduction.

6. Miss Lickert's opinion or conclusion that appellant "on one occasion reprimanded a prostitute who seemed to appear to him to be neglecting her work" or



as stated by the examining inspector “the alien reprimanded and issued verbal instructions in the presence of Miss Lickert to at least one prostitute who was, in his opinion, neglecting her work.”

The evidence in relation to the incident referred to by the Board of Review and the examining inspector, is as follows:

“Q. Did you ever talk to Shorty Yuen about prostitution in the Ardmore Rooms while you were there?

A. Yes, because this little Johnnie—I guess she had been out the night before—she was supposed to be at work at 11:00 and she layed down on the couch and went to sleep and Shorty came up and I was in the back room and didn’t answer the door, and he shook her and told her to get back there that there was somebody back there. I came from the back room about the time he went in there and shook her.” (Miss Lickert’s *ex parte* statement before Immigration Officer; Exhibit “C,” page 4.)

The foregoing excerpt of the testimony taken from the Immigration Record contains no language that could possibly support the “assumption” that appellant had “reprimanded” the girl referred to, “issued verbal instructions” to her, or that appellant was of the opinion that this girl was neglecting her work. Appellant finds no other reference to the incident in the Immigration Record.

Such testimony lacks probative force and is incompetent, as a matter of law, to substantiate the charges set forth in the warrant of arrest.

7. The finding “that the alien was the ‘boss,’ ” and that he “represented himself to Miss Lickert to be the ‘boss’ of the business in the Ardmere Rooms on one occasion after suggesting that she become his mistress”; such finding is based upon the deduction or conclusion of Miss Lickert, not the statements made by appellant to her at that time. Without knowing what was said and done at that time neither the Board of Review nor this Court can ascertain whether the deduction or conclusion of the witness drawn therefrom was warranted. Besides it appears from the circumstances as disclosed by the witness that these statements were the vaporings of an alcoholic mind or an amorous soul—boasting indulged to lend importance or glamor to the speaker—which were not, at the time, even convincing to those in whose presence they were made.

8. The examining inspector, in his summary of the evidence, finds that appellant’s “general demeanor was that of one vested with authority superior to the ‘landlady’s’ ”; the Board of Review makes a similar finding; a conclusion or deduction drawn by the inspector and the Board of Review from facts and circumstances not appearing in the Immigration Record. Whether the opinion expressed in the findings be that of the Board of Review or, of the witness Miss Lickert, it has no probative value in that the record contains no data upon which such an opinion could be based. Appellant has been unable, after close search of the Immigration Record, to find that any such opinion or conclusion was testified to during the hearing and Counsel for the Government and the Board of Review have

given no citation where the same, if contained in the Immigration Record, can be found.

Appellant submits that the findings made by the Board of Review to the effect that appellant was found managing, or connected with the management, of a house of prostitution, are based upon the following facts, to wit: that during 1933, the appellant, as an agent or employee of Tom Quin, "checked" with the landladies who managed the business conducted at the De Luxe Rooms and the Ardmore Rooms the amount of money taken in by each of these establishments and "received a share of that money"; and that upon one occasion, during August, 1936, appellant, on behalf of Georgia Buck and in her interest and for her benefit, called at the Ardmore Rooms and "obtained from Miss Lickert, the landlady in charge of the business conducted in said establishment, the key to the desk where the money was kept and took the money."

What relationship existed between Tom Quin and these establishments during these times does not appear in the record; that he did not participate in the management of the business conducted therein must be conceded in that the Board of Review made no finding to that effect; the same is true as to the relationship of Georgia Buck with the Ardmore Rooms.

Appellant contends that "checking" accounts of the business conducted at an establishment, even though such establishment be a house of prostitution, is not the offense denounced in Section 19, Immigration Act of February 5, 1917, to wit: managing, or being connected with the management, of a house of prostitution.



The word “manage” has a well defined and generally accepted meaning; according to the dictionaries, it means: “to control, direct or conduct; to guide or contrive; to carry on or regulate business or affairs.” The word “management” is “the act of managing, controlling or conducting.”

The Government makes no contention that Appellant “controlled, directed or conducted” the business carried on in these establishments by the landlady in charge thereof.

The sort of acts and conduct on the part of an alien in and about a house of prostitution from which it may be permissible to presume that such alien “manages” or “is connected with the management” thereof, are stated in the opinion of the United States Circuit Court of Appeals, in *Psimoules*, 22 Fed. 118, wherein the following language appears:

“That an alien who assumed to dictate the terms of sale of an interest in the business carried on in a house of prostitution, endeavored to secure a prostitute to work for him there, and had a telephone there in his name and rented by him through which much of the business transacted, was connected with the management of the house.”

While appellant concedes such acts mentioned above are not the exclusive indicia of management, nevertheless appellant contends the acts and conduct claimed to be evidence of management must be of a similar character and import and relate to the business denounced by the statute.

## RECEIVING, SHARING IN OR DERIVING BENEFIT FROM THE EARNINGS OF A PROSTITUTE

The Government relies upon the same facts to establish the charge that Appellant “has been found receiving, sharing in or deriving benefit from the earnings of a prostitute” as urged as proof that appellant was “found managing a house of prostitution” and found “connected with the management of a house of prostitution,” to wit: that appellant, as employee or agent for Tom Quin, received a part of the net proceeds derived from the business conducted at the De Luxe Rooms and, as agent for Georgia Buck, received on one occasion a part of the net proceeds derived from the operation of the Ardmore Rooms.

The record throws no light upon the consideration received by the “landladies” in exchange for the part of their net proceeds that were paid to Tom Quin or to Georgia Buck, or any evidence of any right or interest, either in the buildings where the business of prostitution was conducted or in such business, that might entitle Tom Quin or Georgia Buck to share in the net proceeds of the business.

The burden of proof rests upon the Government to establish by substantial evidence that appellant “received, shared in or derived benefit” personally and for his own use and purposes, a part of the earnings of a prostitute. That appellant “received” a part of the earnings of a prostitute, as agent of Tom Quin or Georgia Buck, and on behalf of and on account of

money due to Tom Quin and Georgia Buck, which funds immediately such collection were turned over by appellant to said Tom Quin and Georgia Buck, is not sufficient to establish that he, appellant, “received, shared in or derived benefit” from the earnings of a prostitute. The Government must go further and prove that appellant retained some part or portion of these moneys for his own use and benefit; that his employer to whom he delivered the funds used them for his, the employer’s benefit and purposes after appellant delivered the same to him, is not evidence that appellant “received, shared in or derived benefit” from the earnings of a prostitute.

Appellant contends that clauses 6 and 7, Section 19, Immigration Act of February 5, 1917, define separate and different classes of alien subject to deportation; that the language and provisions contained in one clause cannot, by judicial construction, be made a part of any other clause describing classes in said Section 19. Clause 6 relates to inmates of houses of prostitution, prostitutes and those connected with the management; clause 7 relates to alien who manage, or who employed in, by or in connection with a house of prostitution.

The Immigration Statute does not make, the “receiving, sharing in or deriving a benefit” from the earnings of one who manages a house of prostitution or from the profits arising from the operation of such a house, a deportable offense. The provision in the first clause quoted, to wit: “an inmate of or connected with the management of a house of prostitution . . .



who shall receive, share in, or derive benefit from any part of the earnings of any prostitute” is directed at a well known class which is described by the United States Circuit Court of Appeal, Ninth Circuit, in *Katz v. Commissioner*, 245 Fed. 316, wherein the court said:

“ . . . but in the same connection, is included any alien who shall receive, share in or derive benefit from the earnings of any prostitute. This alludes to another class, but allied in association to the prostitute class. It is perfectly well known what this class is. There are many vile persons of the male sex who allow themselves to be ‘supported by’ (using the language of Section 2), and take the earnings of, fallen women, which they appropriate to their own particular use, and many of them have no other visible means of livelihood. This is not to say that women may not be guilty of keeping a brothel; but the two classes are clearly defined, so that there need be little uncertainty as to the style or character of the persons Congress designed to comprise by such classification. It is quite unreasonable to suppose that the drygoods salesman or the grocer, who sells his goods to a fallen woman and takes the price from her, or a cabman, who carries her for hire and receives the hire from her, or, as in the present case, the landlord, who rents her abode to her and takes rental therefor, all or any of them were designed to be classified as persons who receive or derive benefit from the earnings of a prostitute, and such, we are impressed, is not the intendment of the statute. . . . considering the spirit and purpose of the statute, we think that there is no intendment to include an alien landlord, who leases to a prostitute

the house in which she lives and practices prostitution and receives from her the rent thereof.”

Katz v. Commissioner, 245 Fed. 316; 9th. Cir.

That the alien who receives, shares in or derives a benefit from a prostitute must be an inmate of or connected with the management of house of prostitution was also stated in the case of *In re Abeldano*, 11 Fed. Supp. 1021, United States District Court, Texas:

“Alien did not live with the prostitute at the place where she carries on her trade, nor did he participate or benefit by her earnings except indirectly in jointly contributing to the payment of the rent of a living room jointly occupied by them. Her place of business was at a house of prostitution where she sold herself for a price. The relations between Abeldano and the woman were personal and private, not public. The case was brought to the attention of immigration officers through a quarrel between the relator and the government witness, Estafana, thus using the government to punish him for asserted wrongs already condoned. The law thus to serve as a means of revenge for the prostitute rather than that justice might be done. The effect of deportation is banishment from this, his country, after 25 years residence.”

Appellant submits that the record contains no finding that appellant ever received any part of the earnings of a prostitute derived from her immoral conduct, or that he received or retained, for his own use and benefit, any part of the proceeds derived from the business conducted in any house of prostitution. That the provisions of Section 19, Immigration Act of 1917,



do not make a resident alien who receives money from the manager or owner of a brothel, not the proceeds of her own immorality, subject to deportation by the order of the Secretary of Labor.

**POWER TO DEPORT MUST BE EXERCISED  
DURING PERIOD WHEN ALIEN A MEMBER  
OF THE UNDESIRABLE CLASS.**

The Immigration Act of February 5, 1917, Section 19, clauses 6 and 7, provides that the alien must be "found" "connected with the management of a house of prostitution," the "alien who manages . . . a house of prostitution" may be deported any time after his entry into the United States. The last clause authorizes the deportation of an alien regardless of how long he has resided in the United States if he should become a member of the objectionable classes made subject to deportation by the statute. This clause is not a statute of limitation permitting the bringing of deportation proceedings against a resident alien who, some five years prior to such proceedings being commenced, had been a member of the deportable class but who for more than five years has not been a member of such class. The precise point was before the United States Supreme Court in the recent case of *Kessler v. Stecker*, 83 Law Ed. 637, wherein it was stated:

*Kessler v. Strecker*, 83 Law Ed. 637.

The Government offered in evidence . . . membership book in Communist Party of the United States



of America issued November 15, 1932, showing dues paid to the end of February, 1933. No evidence alien was a member after March 1, 1933.

“The Government does not attempt to support the warrant of deportation on the second and third grounds therein specified, namely, that the respondent ‘is a member of or affiliated with’ an organization described in the Act. The only evidence of record is that his membership ceased months before the issue of the warrant for his arrest. The contention is that respondent is deportable because, after entry, he became a member of a class of aliens described in Section 1 of the act, to wit, a member of the communist party. . . .

This contention presents the question whether the act renders former membership in such organization, which has ceased, a ground of deportation. Respondent insists that the statute makes only present membership in an organization described in the act such ground.

Section 1, of the act of October 18, 1918, as amended in 1920, has to do with the exclusion of alien immigrants and specifies five classes, members of which may not be admitted to the United States. Section 2 of the Act of 1918, which was not altered by the Act of 1920, deals with deportation. It provides that ‘any alien who, *at any time*, after entering the United States, is found to have been at the time of entry, or *to have become thereafter*, a member of any one of the classes of aliens enumerated’ in section 1, upon warrant of the Secretary of Labor be taken into custody and deported in the manner provided by law.

Relying on the phrases italicized in the quotation, the Government insists that the section embraces an alien who, after entry, has become a member of an organization, membership in which, at the time of his entry, would have warranted his exclusion, although he has ceased to be a member at the time of his arrest. We hold that the Act does not provide for the deportation of such an alien. This conclusion rests not alone upon the language, but, as well, upon the context and the history of the legislation.”

“In the absence of a clear and definite expression, we are not at liberty to conclude that Congress intended that any alien, no matter how long a resident of this country, or however well disposed toward our Government, must be deported, if at any time in the past, no matter when, or under what circumstances, or for what time, he was a member of the described organization. In the absence of such expression we conclude that it is the *present membership* or *present affiliation*—a fact to be determined on evidence—which bars admission, bars naturalization, and requires deportation.”

Counsel holds no brief approving or condoning the acts and conduct of those who are associated or connected with, or participate in the vicious system that, according to the Immigration Record, appears to have prevailed in San Diego some years ago, under which certain persons levy and collect from the owners of gambling houses and houses of prostitution a part of their proceeds for the “privilege” of operating such illegal and immoral establishment in the community.

However, counsel does contend that Congress has not made the “association with commercialized vice” a ground for deporting an alien from the United States. Congress has seen fit to set forth with particularity and in clear and explicit terms the specific acts and course of conduct which if done or followed by an alien, subject him to deportation and, the Secretary of Labor has no power to amend or enlarge these provisions by his own “fiat.” Congress alone has that power.

### CONCLUSION

It is respectfully submitted that under the record as called to the court’s attention and the points and authorities made and cited, the appeal should be sustained.

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No. 9564

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

TOM WING ART, alias WING FOOK TOM, alias SHORTY  
YUEN,

*Appellant,*

*vs.*

WILLIAM A. CARMICHAEL, District Director of U. S.  
Immigration and Naturalization Service, District No.  
20,

*Appellee.*

---

## BRIEF OF APPELLEE.

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*vs.*

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Immigration and Naturalization Service, District No.  
20,

*Appellee.*

---

## BRIEF OF APPELLEE.

---

### Preliminary Statement.

This is an appeal from an order of the District Court denying appellant's petition for a writ of habeas corpus.

The certified record of the Department of Labor, No. 55983/430, has heretofore been filed with this Court and will be referred to throughout this brief as the "Immigration Record". For the sake of convenience each page of the Department record has been renumbered in red at the bottom, beginning with number 1 and ending with 328, and these page numbers will be cited when reference is made thereto.

### Statement of Facts.

The appellant herein is an alien, a native and citizen of China, of the Chinese race, aged 35 years and unmarried. He was admitted into the United States at the port of San Francisco, California, on June 12, 1921, and since 1922 has resided continuously at San Diego, California.

On August 16, 1938, the alien was arrested under a warrant issued by an assistant to the Secretary of Labor directing that said alien be taken into custody and given a hearing to show cause why he should not be deported from the United States. In the hearing he was informed of the nature of the proceeding and the grounds upon which his deportation was sought. At his request the hearing was continued to afford him an opportunity to employ counsel and on August 20, 1938, he being then represented by counsel, the hearing was resumed. Hearings were then held between August 20, 1938 and March 9, 1939. Counsel for alien participated throughout said hearings, examining and cross-examining witnesses. Transcript of testimony taken in these hearings runs from page 27 to page 268 [see Immigration Record]. At the conclusion the Examining Inspector summarized the evidence [see Immigration Record pp. 269 to 278], and recommended that the alien be deported to China.

A transcript of the entire record was then forwarded to the Department in Washington, D. C., where it was considered by a Board of Review. The alien was represented before the Board by counsel [see Immigration Rec-

ord p. 3]. The Board sustained the findings of the Examining Inspector and recommended that the alien be deported to China. The Department adopted the findings and recommendation of said Board and on August 14, 1939 an assistant to the secretary, having become satisfied from the proof submitted, that the alien was subject to deportation under section 19 of the Immigration Act of February 5, 1917, in that the alien:

- (1) Has been found receiving, sharing in or deriving benefit from the earnings of a prostitute;
- (2) Has been found connected with the management of a house of prostitution; and
- (3) Has been found managing a house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather,

issued his warrant commanding appellee to deport the said alien to China. The warrant also provided that the alien be permitted to depart without expense to the United States to any country of his choice except foreign contiguous territory. The alien refused to so depart and appellee was about to execute the warrant of deportation when the alien sued out a writ of habeas corpus. From an order dismissing the writ and remanding the alien to the custody of appellee the alien is prosecuting the present appeal.



### Issues.

Nine specifications are set forth by counsel in his "Statement of Points" [Tr. p. 31]; however, it is believed that these may be summarized and restated in the following questions, which are the real issues of the case:

- (1) Was there any evidence to sustain the decision of the Secretary of Labor?
- (2) Was a fair hearing accorded?

The appellant also brings up the following question:

- (3) Must an alien be caught in the act of receiving benefits from prostitution, etc., at time of arrest in order to be comprehended within the statute directing deportation of such classes of aliens?

### Statutes.

The applicable statutory provisions are as follows:

Section 19 of the Immigration Act of February 5, 1917 (8 U. S. C. A., 155), provides in part:

"\* \* \* any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed by, in or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, \* \* \* shall, upon the warrant of the Secretary of Labor be taken into custody and deported. \* \* \* *In every case where any person is ordered deported from the United States under the provisions of this act, or any law or treaty, the decision of the Secretary of Labor shall be final.*" (Italics ours.)

Section 16 of the Act hereinabove mentioned (8 U. S. C. A., 152), provides:

“\* \* \* Said inspectors shall have the power to administer oaths, and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence; \* \* \*.”

Thus, the statute makes the decision of the Secretary of Labor final, and Congress has intrusted to the political department of the government the execution of laws providing for the deportation of aliens. Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts, yet Congress may intrust the final determination of those facts to an executive officer, and if this is done, his order is due process, and no other tribunal, unless expressly authorized by law to do so, will reexamine the evidence upon which he acted, or controvert its sufficiency:

*Nishimura Ekin v. U. S.*, 142 U. S. 651, 660;

*Fong Yue Ting v. U. S.*, 149 U. S. 698, 713;

*Lem Moon Sing v. U. S.*, 158 U. S. 538, 545;

*Fok Yung Yo v. U. S.*, 185 U. S. 296, 302;

*The Japanese Immigrant Case*, 189 U. S. 86, 100.

It is clear, therefore, that if there is any evidence in the record that the alien herein has been found managing a house of prostitution or connected with such management, or who has been receiving, sharing in or deriving benefit from any part of the earnings of any prostitute, such alien is subject to deportation.

## ARGUMENT.

### 1. Was There Any Evidence to Sustain the Decision of the Secretary of Labor?

Appellee submits there was ample evidence before the secretary to justify issuance of the warrant of deportation. A brief but comprehensive review of the evidence in this case will be found in the memorandum dated August 14, 1939, prepared by the Board of Review [see Immigration Record pp. 3 to 11]. Counsel accepts this memorandum and the summary prepared by the Examining Inspector [Immigration Record pp. 269-278], as a correct statement of the facts (Opening Brief p. 2). It will be found that the evidence overwhelmingly supports each of the three charges contained in the warrant of deportation. It is only necessary to sustain one to justify deportation:

*Lewis v. Frick*, 233 U. S. 291;

*U. S. ex rel. Freeman v. Williams*, 175 Fed. 274;

*U. S. ex rel. Rennie v. Backus*, 204 Fed. 908;

*U. S. ex rel. Dimond v. Uhl*, 266 Fed. 34.

The credibility of witnesses and the weight of testimony is for the immigration authorities and is not reviewable on habeas corpus proceedings. If there is evidence to sustain the charge, the decision of the Secretary of Labor as to the weight of the proof is accepted by the courts as conclusive:

*Low Wah Suey v. Backus*, 225 U. S. 460, 468;

*Zakonaite v. Wolf*, 226 U. S. 272, 275;

*Tisi v. Tod*, 264 U. S. 131;



*Kenmotsu v. Nagle* (C. C. A. 9), 44 Fed. (2d) 933 (Cert. denied, 283 U. S. 832);

*Kumaki Koga v. Berkshire* (C. C. A. 9), 75 Fed. (2d) 820 (Cert. denied, 295 U. S. 37).

In:

*Ng Fung Ho, etc. v. White*, 259 U. S. 276,

the court said, at page 284:

“For where there is jurisdiction, a finding of *fact* by the executive department is conclusive \* \* \* and courts have no power to interfere, unless there was either denial of a fair hearing \* \* \* *or the finding was not supported by evidence* \* \* \* or there was an application of an erroneous rule of law. \* \* \*.” (Italics ours.)

and in *Tisi v. Tod*, *supra*, at page 133, Mr. Justice Brandeis said:

“\* \* \* We do not discuss the evidence because the correctness of the judgment of the lower court is not to be determined by inquiring whether the conclusion drawn by the Secretary was correct or by deciding whether the evidence was such that if introduced in a court of law it would be legally sufficient to prove the fact found.”

In *Kumaki Koga v. Berkshire*, *supra*, Circuit Judge Garrecht made the following statement concerning this rule:

“This court said in *Chin Share Ging v. Nagle, etc.*, 27 F. (2d) 848, 849 ‘\* \* \* The conclusions of administrative officers upon issues of fact are invulnerable in the courts unless it can be said that they could not reasonably have been reached by a fair-minded man, and hence are arbitrary.’ *Where the*

*issues rest upon conflicting testimony the court is not at liberty to review administrative finding, unless in some other particular the conduct of the officers was such as to render the hearing unfair.” (Italics ours.)*

The two principal witnesses for the Government, Mrs. Lorraine Gordon and Norma Bondley Lickert, made certain statements on May 14, 1938 [See Exhibit “B”, Immigration Record pp. 304-326], and it was on the basis of these statements the warrant was issued. Mrs. Gordon testified to having been employed as a prostitute in the “De Luxe Rooms” at San Diego, California in 1932 and 1933 and during her employment saw the alien call almost every night, and at regular intervals check with the “Madame”, Mrs. Jean Alvarado, the amount of money earned by prostitution during the day and receive his share. She further testified the alien put her in charge of the “De Luxe Rooms” to serve as the “Madame”, and she did so serve in this capacity in the alien’s employment, and divided the net proceeds earned by the house with him. Miss Lickert testified that for about three months, beginning in July, 1938, she acted as “Madame” of the “Ardmore Rooms” and was informed by a woman named “Dorothy”, who had employed her, that the alien was the “boss” of the establishment. She testified of her own knowledge that the alien possessed a key which fitted a lock in the rear entrance door of said Ardmore Rooms; that he called there frequently; that he used the telephone there, and that on one occasion he took the money which had been earned by the house through prostitution, as his share.

At no time during the proceedings was any contention made that the “Ardmore Rooms” and the “De Luxe Rooms” were anything but houses of prostitution; neither

was it disputed that the two witnesses, Lorraine Gordon and Norma Bondley Lickert, had been employed in these houses as prostitutes.

Both these witnesses were produced at the hearing and subjected to a searching cross-examination by counsel for alien. No flaw could be found in their testimony. They were neither biased nor prejudiced. They testified truthfully to facts within their personal knowledge.

The same cannot be said for the testimony of the prostitute witnesses Jean Alvarado and Mary T. (Georgia) Buck produced by the alien. *These were the only witnesses who testified in his behalf.* An examination of their testimony [see Immigration Record pp. 98-180], shows it was contradictory, inconsistent, evasive and vague. To illustrate, we quote a portion of the testimony. Jean Alvarado [see p. 120 Immigration Record], testified:

“Q. When was the last time you saw Rita Morgan?

\* \* \* \* \*

A. (hesitates) I couldn't say.

Q. Well, was it as long as a year ago?

\* \* \* \* \*

A. I don't remember.

Q. As long as two years ago?

\* \* \* \* \*

A. I don't really remember.

Q. Do you think you have seen her since you allegedly bought the De Luxe from her? (1922)

\* \* \* \* \*

A. (hesitates) I don't remember that.

Q. You can't remember having seen her since then?

A. No.”



The Rita Morgan mentioned operated the De Luxe Rooms as a house of prostitution just prior to the proprietorship of the witness Jean Alvarado. After a short recess Jean Alvarado was recalled to the stand and testified as follows [Immigration Record p. 121]:

“Q. I will ask you again about Rita Morgan. (Attorney Beck to witness: And you answer the question to the best of your recollection.)”

Examining inspector addressing witness:

“Q. Have you seen her since, according to your testimony, you bought the De Luxe from her?

A. Since I bought the De Luxe?

Q. Yes.

A. I believe I have, yes.”

Subsequently, and in the same proceedings, she testified on this subject as follows [Immigration Record p. 131]:

“Q. Where did you see her? (Rita Morgan.)

“A. *I saw her the other night. I went up to Mr. Saunders’ office and the woman was sitting in there and I really didn’t recognize her at first. I really didn’t when I walked in there. The woman has changed a lot since I saw her and I never had one word with her, and since we went out to lunch I was thinking about it and I thought I should tell you.*”  
(Italics ours.)

Testimony of the other witness, Mary T. Buck, presented by the alien, while not so contradictory as that of Jean Alvarado, nevertheless, was sufficiently inconsistent to raise a reasonable doubt as to her veracity.

The evidence given by the two Government witnesses, Lorraine Gordon and Norma Bondley Lickert, was cor-

roborated in many particulars by the testimony of four persons not connected with the business of prostitution [see Immigration Record pp. 211-266]. To a certain extent the testimony of the two defense witnesses also corroborated that of Lorraine Gordon and Norma Bondley Lickert.

Relying mainly upon the case of:

*Katz v. Commissioner*, 245 Fed. 316,

counsel argues that the statute (8 U. S. C. A., 155), does not make "receiving, sharing in or deriving a benefit from the earnings of one who manages a house of prostitution or from the profits arising from the operation of such house" a deportable offense (Opening Brief p. 24), and that only inmates of houses of prostitution are deportable as aliens connected with their management.

The *Katz* case, *supra*, is not authority for such an interpretation of the statute herein involved. In that case the alien's deportation was sought on the ground that he had been found "receiving, sharing in, or deriving benefit from the earnings of a prostitute or prostitutes". The only evidence in support of the charge was that he had leased certain premises to prostitutes in which they plied their trade; and that he received rent from such prostitutes. There was no evidence that he had any relation with the prostitutes other than that of landlord and tenant; nor that he received any money from such prostitutes other than as rentals. He was not in any way connected with the management or conduct of the business of prostitution. Under such circumstances the court correctly found that the alien did not come within the meaning of the statutory provisions for the deportation of an alien who is "receiving, sharing in, or deriving benefits" from

the earnings of prostitutes. But the court *did* say that if in addition Katz was conducting or managing such a house of prostitution, it would be a reasonable inference and deduction that he was taking the earnings of an inmate. The court did not say or decide that the sixth clause in section 19 (8 U. S. C. A. 155), is limited to inmates of a house of prostitution and inmates connected with the management of such a house.

In the instant case there is no tenant-landlord relation between the prostitutes and the alien. There is conclusive evidence that he was in fact the manager and overseer of at least two houses of prostitution; that he not only managed and supervised the management of such houses but that at intervals he appeared on the premises and collected his share of the proceeds derived from prostitution. The case of:

*In re Abeldano*, 11 Fed. Supp., 1021,

is also relied upon by counsel to sustain his position. This case is clearly distinguishable from the case at bar. It was held in that case by the District Court at Houston, Texas, that the private relations of an alien with a prostitute are personal, not public, and are not connected with the promotion of the trade or business of prostitution as such. We believe it is clear that the legislative intent expressed in clauses 5, 6 and 7 of section 19 was to deport from the United States aliens receiving, sharing in or deriving benefit from the proceeds of prostitution, or connected with the business of prostitution or managing houses of prostitution, regardless whether they are inmates of such houses.

This is not a case of first impression. The law involved has been interpreted, applied and declared in many cases.



In:

*Lindsey v. Dobra*, 62 Fed. (2d) 116 (Cert. denied Feb. 13, 1933, 288 U. S. 606),

Dobra was charged with “managing a house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes or where prostitutes gather”. He was not an inmate of a house of prostitution but operated a restaurant, soft drink stand and gambling place frequented by prostitutes who bought cigarettes, etc., and sometimes solicited patrons. Speaking of Dobra’s place, the court said:

“\* \* \* The place was a place of amusement and resort primarily for men. The narrow question is whether prostitutes habitually frequented and gathered at the place for purposes connected with their business.”

The court held that Dobra was subject to deportation under the statute and that he was not protected from deportation merely by the absence of his direct connection with or interest in the activities of prostitutes. See:

*Kielema v. Crossman* (C. C. A. 5), 103 Fed. (2d) 292;

*Ranieri v. Smith* (C. C. A. 7), 49 Fed. (2d) 537;

*Lucchesi v. Weedin* (C. C. A. 9), 61 Fed. (2d) 656;

*Inouye v. Carr* (C. C. A. 9), 98 Fed. (2d) 46.

The testimony as summarized in the aforementioned memorandum prepared by the Board of Review [Immigration Record pp. 3-11], points out ample competent evidence to support the secretary’s decision. Two of the Government’s witnesses directly identified the alien as the

one who shared in their earnings as prostitutes. The witness Lorraine Gordan gave direct evidence of alien's management of the De Luxe Rooms and substantiated her testimony with the production of a paper (Exhibit "E"), upon which the alien had figured the division of profits accruing from the operation of the house of prostitution known as the "De Luxe Rooms". She was asked [Immigration Record p. 39], if the handwriting on this paper [Exhibit "E", page 8, Immigration Record p. 289], was that of the alien:

"\* \* \* \* \*

Q. Page 8?

A. Shorty Yuen's.

Q. Is he present now?

A. Yes, sir.

Q. Will you identify him?

A. The gentleman right there (points to the alien subject of these proceedings).

\* \* \* \* \*

Q. Page 8 is in the handwriting of Shorty Yuen. Did you see that handwriting made?

A. Yes, sir.

Q. You were present when it was made?

A. Yes, sir.

Q. By Shorty Yuen?

A. Yes, sir.

Q. And was that when you were living in the De Luxe?

A. Yes, sir."

Page 41, Immigration Record:

“Q. You stated that Shorty Yuen, the subject of these deportation proceedings, here present, prepared these figures in his own handwriting in your presence and in the presence of your husband?

A. Yes, sir.

\* \* \* \* \*

Q. The point I wish to cover there is did Shorty Yuen, the subject of these proceedings, make these figures while you and he were endeavoring to settle finally the accounts of the establishment known as the De Luxe?

A. Yes, sir.”

Page 40, Immigration Record, referring to figures on sheets of paper on which witness had figured money which she said was divided with alien:

“Q. *And how was that incoming money derived?*

A. *Through prostitution.*

Q. Any other source?

A. No, sir.” (Italics ours.)

If this witness' statements were false that the alien made the figures to which the foregoing testimony refers [Immigration Record p. 289], the alien would have certainly made an emphatic denial. *He does not deny it.* It is undisputed that the witness Lorrain Gordon practiced prostitution at the De Luxe Rooms and that this hotel was a brothel. Thus a direct connection with the management of a house of prostitution is established, as well as the fact alien received the proceeds derived from the practice of



prostitution. Concerning the extent to which it must be shown an alien is “connected” with the management of a house of prostitution, the court said in:

*In re Psimoules* (D. C. Cal.), 222 Fed. 118 (Appeal dismissed, 224 Fed. 1022):

“\* \* \* the statute does not attempt to define the extent to which an alien must be ‘connected’ with such management, in order that he may be placed under the ban of the immigration law. *Giving full meaning to the terms employed it is sufficient if it be shown that such alien is ‘connected’ in any degree or capacity with such management.* In other words, if he assumes at all, knowingly, any of the responsibilities for the carrying on or conduct of the inhibited business, he may then be said to be ‘connected’ with its management.” (Italics ours.)

See also:

*United States v. Kimi Yamamoto* (C. C. A. 9), 240 Fed. 390;

*United States v. Sui Joy* (C. C. A. 9), 240 Fed. 392.

We have no desire to tax the Court’s indulgence by reproducing further testimony in detail. There is abundant evidence to sustain the charges on which alien’s deportation is sought.

## 2. Was a Fair Hearing Accorded?

Respondent submits the hearing was fair in every respect.

An examination of the Immigration Record will show that the hearing was conducted in conformity with the Rules and Regulations prescribed by the Secretary of Labor and conformed with all the requirements of "due process". Rules prescribed by the Secretary of Labor pursuant to law have the full force and effect of law:

*Fok Yung Yo v. U. S.*, 185 U. S. 296;

*Chun Shee v. White* (C. C. A. 9), 9 Fed. (2d) 342;

*Haff v. Tom Tang Shee* (C. C. A. 9), 63 Fed. (2d) 191.

The alien was fully apprised of the nature of the proceedings and his right to counsel, and he did, in fact, employ counsel. No part of the evidence upon which the warrant was issued was concealed or withheld from him or his counsel and he was not deprived of the privilege of bringing forward explanatory or rebuttal evidence. Several of the Government's witnesses were examined at great length by the alien's counsel. The alien was permitted to introduce testimony in his own behalf and was represented before the Board of Review by counsel who submitted a brief in his behalf. This was not a denial of a fair hearing.

As the hearings under the warrant were properly conducted with regard to the rights of the alien, under the rule in:

*Bilokumsky v. Tod*, 263 U. S. 149,

and as set forth in the case of:

*In re Kosopud*, 272 Fed. 330 (Citing *Low Wah Suey v. Backus*, 225 U. S. 460, 471; *Mok Nuey Tau v. White* (C. C. A. 9), 224 Fed. 743; *Guiney v. Bonham* (C. C. A. 9), 261 Fed. 582, 585; *Wolck v. Weedin* (C. C. A. 9), 50 Fed. (2d) 928, 930),

the test of a fair hearing has been met.

**3. Must an Alien Be Caught in the Act of Receiving Benefits From Prostitution, Etc., at Time of Arrest in Order to Be Comprehended Within the Statute Directing Deportation of Such Classes of Aliens?**

We submit it is not the sense and reason of this statute that immigration officers should be compelled to catch an alien in the actual act of being connected with the management of a house of prostitution; or in the actual act of receiving, sharing in and deriving benefit from the earnings of a prostitute in order to bring him within the statute. An interpretation of a statute which leads to such absurd consequences is improper if the statute is susceptible of another interpretation by which such consequences can be avoided:

*Ex parte Ellis*, 11 Cal. 222;

*Ryegate v. Wardsboro*, 30 Vt. 746;

*Caledonian Ry. v. N. Brit. Ry., L. R.*, 6 App. Cas. 122.



The statute under consideration is plainly susceptible of an interpretation avoiding such harmful and nullifying consequences. Congress was aiming at the deportation of all alien panders and prostitutes. By the use of the word “found” in this connection it meant a determination arrived at through investigation—a conclusion announced as the result of investigation upon a disputed fact or state of facts, and there was no intention to restrict the enforcement of the law to those few actually caught in the act of transacting business connected with prostitution. Such has been the construction placed on this section by the Secretary of Labor for many years. No reported judicial decision discloses that such construction has ever been questioned in the courts, and, so far as can be ascertained, no question as to the propriety of this construction was ever raised in the Department. Having been thus exercised over a long period of years, that construction of the law is entitled to great weight. That is so, especially when such executive or administrative action has never been questioned or restricted by Congress when other immigration laws were enacted by that body. See:

*Constanzo v. Tillinghast*, 287 U. S. 341,

particularly the following statement on page 345:

“The failure of Congress to alter or amend the section, notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight, even if we doubted the correctness of the ruling of the Department of Labor.” (Citing cases.)

All statutes must be given a reasonable construction with a view to effecting the object and purpose thereof:

*Low Wah Suey v. Backus*, 225 U. S. 460, 475;

*The Chinese Exclusion Case*, 130 U. S. 581;

*U. S. v. Hung Chang*, 134 Fed. 19 (C. C. A. 6);

*In re Bautista*, 245 Fed. 765, 772.

Counsel cites the case of:

*Kessler v. Strecker*, 59 S. Ct. 694,

in support of his contention, but the history of the act there construed, as well as the differences in language and facts, render this case clearly distinguishable.

The *Strecker* case, *supra*, construed the Act of October 16, 1918 (40 Stat., 1012), which relates to the exclusion and expulsion of aliens who are members of anarchistic and similar classes. The statute construed reads:

“Sec. 2. That any alien who at any time after entering the United States, is found to have been at the time of entry or to have become thereafter, a member of any one of the classes of aliens \* \* \* shall, upon the warrant of the Secretary of Labor, be taken into custody and deported \* \* \*.”

The court, in construing that section, held that the phrase “at any time” qualifies the verb “found” and that subsequently the section does not require the exclusion and deportation of those who have been in the past but are no longer members of a prescribed organization. We do not have such a phraseology in the statute involved in the case at bar. That portion of the statute applicable in the instant case reads as follows:

“\* \* \* any alien who shall be found an inmate of or connected with the management of a house of

prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of a prostitute \* \* \*.”

Thus we see that the word “found” appears but once and is used only in the first phrase of the clause quoted. As here used, the verb “found” qualifies the phrase “any alien” appearing in the first portion of the clause. It does not qualify the phrase “or who shall receive \* \* \*”, nor does it qualify any of the subsequent clauses. It is not used or intended to be used in any of the subsequent phrases or clauses. For example, the 6th clause provides for the deportation of any alien who (1) “shall be found an inmate of or”, (2) “connected with the management of a house of prostitution”, or (3) “practicing prostitution after such alien shall have entered the United States”. The other classes of aliens are those who receive, share in or derive benefit from any part of the earnings of any prostitute.

The first important immigration act covering aliens connected with prostitution was that of March 3, 1875 (18 Stat. 477), which forbade the importation of women for purposes of prostitution and made such importation a felony. It had become obvious that of all “undesirables” who might strive to enter the country, those involved in prostitution and immorality akin to it were least worthwhile additions to the population and should be rigorously prohibited from entering or remaining here. By 1903 the practical application of this idea had been worked out in definite form, for the act passed that year (32 Stat. 828), not only called for the deportation of prostitutes and persons who procure or attempt to bring in prostitutes, but it



provided that the importation into the United States of any woman or girl for the purpose of prostitution was penalized. By 1907 (34 Stat. 898), aliens found inmates of, or connected with the management of a house of prostitution or deriving benefit from any part of such earnings were deportable, with a three year limitation. In 1910 (36 Stat. 263), the deportation provisions were extended by adding "persons who are supported by or receiving in whole or in part the proceeds of prostitution" and the three year limit was removed, thus introducing the principle of deportation of such persons at any time after entry. In *United States v. Sui Joy, supra*, at page 393, the court in construing this Act, said:

"We think that Congress by the act has, in unlimited terms, provided that 'any alien \* \* \* who shall receive, share in, or derive benefit from any part of the earnings of a prostitute,' etc., shall be deemed to be unlawfully within the United States and shall be deported."

and held that any alien who, while a resident of the United States, commits the acts outlined, is deportable. The same year brought forth the "White Slave Traffic" Act (36 Stat. 825), which is still in force. It will be seen that the development of the law was marked with increasing severity. The present provisions relating to the deportation of prostitutes and persons connected with prostitution are founded on a basic immigration act of 1917, the Act of February 5, 1917 (39 Stat. 875), which was the first in importance after 1910. Under this act, without excep-

tions, aliens found connected with the management of a house of prostitution or receiving any share in the earnings of prostitutes are deportable. Congress, in passing this act, clearly intended it to provide for the deportation of this class of persons without requiring their detection in the actual act defined and such intent is plainly reflected in the provisions of the 1917 Act. It certainly was not considered at any time that such patently undesirable aliens could escape deportation if they were not caught redhanded in the actual act of managing a house of prostitution, etc.

Thus we see it has been the policy of Congress to rid this country of alien panderers and prostitutes; and, the meaning of the statute has been construed to meet cases which are clearly within the spirit and reason of the law and the evil which it was designed to remedy. Where the sense is doubtful the court should lean to that sense which is most agreeable to the spirit and reason of the law:

*Gibbons v. Ogden*, 22 U. S. 1, 83.

However, even if the argument advanced by counsel for construction of the word “found” is sound (conceding this solely for the purpose of argument), it has been previously pointed out the latter part of clause 6 reads: “\* \* \* or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute \* \* \*”, so that those aliens who receive, share in, or derive benefit from the earnings of any prostitute, do not have to be “found”, or, as counsel contends, actually caught in the act of receiving proceeds from the earnings of prostitution, in order

to become subject to deportation. It follows, therefore, that even if it is found by this Court that the alien is not subject to deportation on the ground he is managing or connected with the management of a bawdyhouse for the reason he was not caught redhanded; he will still be subject to deportation on the ground he is receiving, sharing in and deriving benefit from the earnings of a prostitute. The various deportable classes outlined in clause 6 are connected by the word "or", indicating a choice of either. In this sense, that portion of the statute calling for the deportation of aliens receiving benefit from the proceeds of prostitution reads as follows:

"\* \* \* any alien \* \* \* who shall receive, share in, or derive benefit from any part of the earnings of any prostitute \* \* \* shall upon the warrant of the Secretary of Labor, be taken into custody and deported."

Counsel has failed to cite a single case, and we have been unable to find any, which support his contention. On the other hand, the courts have consistently construed this statute to support the Government's contention. In the case of:

*United States v. Reimer* (C. C. A. 2), 103 Fed. (2d) 435),

the alien had been ordered deported on May 15, 1935, as one found assisting a prostitute. The only evidence sustaining that charge was an occurrence in 1929, at which time the alien had been convicted on a charge of receiving women into a room "for the purpose of prostitution—lewdness—assignation", and for knowingly permitting them to



remain there for said purpose. The court held that the conviction of the alien and the woman in 1929 was sufficient to support the warrant of deportation on the ground that the alien had been found assisting a prostitute. The court said:

“It is doubtless the law that the words in section 19 of the 1917 Act, ‘assists any prostitute’, broad as they are, are restricted in their sense to conscious assistance of a prostitute in pursuit of her unlawful business. *Mita v. Bonham*, 9 Cir., 25 F. 2d 11; *Marino v. Zurbrick*, D. C., 52 F. 2d 160. But there was enough in the record for the Secretary to find that the appellant had knowingly rendered that sort of assistance to a prostitute. It is hardly necessary to say again that findings of fact by the Secretary of Labor in a deportation case are not subject to review by the courts if there was substantial evidence before the Secretary to support the findings. *Costanzo v. Tillinghast*, 287 U. S. 341, 53 S. Ct. 152, 77 L. Ed. 350; *United States ex rel. Di Tomasso v. Martineau*, 2 Cir., 97 F. 2d 503.”

Furthermore, it was not urged at the hearing that the alien was not, at the time the warrant of arrest was issued, connected with the management of a house of prostitution or sharing in the proceeds of prostitution, or that he had never been so connected with such activities. The alien’s defense was a general denial of all charges contained in the warrant of arrest. Notwithstanding the alien’s denial, the evidence is conclusive that he was so connected and that he was sharing in and deriving benefit from the proceeds of prostitution. The alien has not produced any evidence that he has ever changed his conduct or association with houses of prostitution.

### Conclusion.

There being no evidence that the hearing in this case is unfair appellee believes that the facts and law compel the deportation of appellant under the charges set forth in the warrant of deportation and therefore respectfully urges that the decision of the court below should be affirmed.

Respectfully submitted,

WM. FLEET PALMER,

*United States Attorney,*

By RUSSELL K. LAMBEAU,

*Assistant United States Attorney.*

No. 9564

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In the  
United States  
Circuit Court of Appeals  
For the Ninth District

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TOM WING ART, alias WING FOOK  
TOM, alias SHORTY YUEN,

*Appellant*

vs.

WILLIAM A. CARMICHAEL, Dis-  
trict Director of U. S. Immigration  
and Naturalization Service, District  
No. 20.

*Appellee*

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Upon Appeal from the District Court of the United  
States for the Southern District of California,  
Central Division.

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**APPELLANT'S REPLY BRIEF**

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**FILED**

**OCT 5 - 1940**

**PAUL P. O'BRIEN,**

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In the  
United States  
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TOM WING ART, alias WING FOOK  
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vs.

WILLIAM A. CARMICHAEL, Dis-  
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and Naturalization Service, District  
No. 20.

*Appellee*

No. 9564

---

APPELLANT'S REPLY BRIEF.

The appellee's argument is divided into three parts,  
to-wit:

1. Was there any evidence to sustain the decision of the Secretary of Labor?
2. Was a fair hearing accorded?
3. Must an alien be caught in the act of receiving benefits from prostitution, etc., at time of arrest in order to be comprehended within the statute directing deportation of such classes of aliens?

Answering the first question, it is apparent therefrom that counsel for the appellee has missed completely the point of appellant's contention. Appellant makes no point as to whether the evidence sustains the facts

found by the examining inspector and the Board of Review but stands upon the proposition that the facts so found do not constitute any offense denounced by the Immigration Act of February 5, 1917, and declared therein to be legal grounds for the deportation of an alien out of and from the United States.

Appellant has conceded for the purposes of this appeal, that the facts so found are true; but he contends that the conclusions drawn by the Secretary of Labor from the facts so found constitutes a violation of the Immigration Act of 1917, are conclusions of law and a matter for judicial review whenever such conclusions are contrary to law.

Appellant, however, concedes no fact or facts not contained in the summary made by the examining inspector or the Memorandum filed by the Board of Review. Counsel's assertion (Appellee's Brief, page 9) to the effect that it was not "disputed that the two witnesses, Lorraine Gordon and Norma Bondly Lickert had been employed in" the Ardmore Rooms and the De Luxe Rooms "as prostitutes," is not a fact found by the examining inspector nor the Board of Review, and is contrary to the undisputed testimony that Miss Lickert was not a prostitute and did not work at either of these establishments as a prostitute, and that Lorraine Gordon, during times mentioned in her testimony when she alleges she shared the net proceeds of the business conducted in Ardmore Rooms there as landlady or



manager thereof, she did not herself practice prostitution at that time.

Counsel for appellee also asserts that "Two of the Government's witnesses directly identified the alien as the one who shared in their earnings as prostitutes" (Appellee's Brief, page 14). Counsel for appellee insists upon using the terms "sharing in the earnings of a prostitute" and "sharing with the landlady or manager of a house of prostitution the net proceeds of the business conducted in said establishment" as synonymous. An error that tends to mislead the Court and confuse the issues. The sharing with the prostitute is a deportable offense, the other is not. Appellant does not concede any fact or facts which exist solely by reasons of the assertions of counsel.

Counsel for appellee, without citation to, or quotation from, the Immigration Record, refers to the "direct evidence of alien's management of the De Luxe Rooms"; Appellee's Brief, page 14. Appellant has not been able to find such "direct evidence" and has no way of determining what portion of the evidence the appellee contends constitutes such "direct evidence." Appellant assumes that such "direct evidence" is not in the Immigration Record, and if such assumption be well founded, the alleged "substantiation" of such non-existing testimony could not give substance to that which does not exist.

Appellant cannot agree with counsel for appellee in the interpretation of the Katz Case, 245 Fed. 316. Ap-

pellee, in its statements of the facts present in the Katz Case, concedes "there was no evidence that he (Katz) had any relation with the prostitutes . . . nor that he received any money from such prostitutes other than rentals. He was not in any way connected with the management or conduct of the business of prostitution." Appellee's Brief, page 11.

Appellee concedes that "under such circumstances the court correctly found that the alien did not come within the meaning of the statutory provisions for the deportation of an alien who is "receiving, sharing in or deriving benefits from the earnings of prostitutes." Appellee's Brief, page 11).

The same statement is true as to the facts presented in the case at bar. Neither the examining inspector nor the Board of Review found as a fact that appellant "had any relation with the prostitutes" who plied their immoral trade in the Ardmore Rooms or the De Luxe Rooms; "nor that he received any money from such prostitutes . . . " or, that "he was in any way connected with the management or conduct of the business of prostitution."

The findings in case at bar are to the effect that appellant received from Mrs. Alvarado a part of "the proceeds of the prostitution business conducted" at the Ardmore Rooms during the time Lorriane Gordon was working there as a prostitute; Memorandum filed by Board of Review. That while Gordon Lorraine was manager of the De Luxe Rooms she divided the net

proceeds from the business she operated there with Appellant. The Government introduced no evidence tending to indicate the consideration she received for the payments alleged to have been made by her beyond the facts above stated and that appellant was the "collector" for Tom Quin and Georgia Buck the reputed owners of these establishments and the rental thereof was paid by the occupant in this manner. Memorandum filed by the Board of Review contains the following language:

"There is some indication that the connection of this alien with the business of prostitution in these two places may have been as the agent of Tom Quin, who is alleged to have been the employer of this alien and the Board of Review agrees with the stated opinion of the examining inspector that 'it is unnecessary to distinguish' whether the alien's connection with the business of prostitution in these places was that of a proprietor or that of an agent of a proprietor. The wording of the Immigration Act does not appear to require that for an alien to be deportable under the statute he need be shown to have a proprietary interest in the operation of a house of prostitution."

Appellant contends that the principle of law so announced by the examining inspector, and approved by the Board of Review, is erroneous and the application thereof to the facts, in the case at bar constitutes prejudicial error. The examining inspector and the Board of Review in applying such false principle of law as-



sumes that the Immigration Act of 1917 provides that ownership of a house of prostitution by an alien constitutes a deportable offense and that an alien agent of such owner who has never participated in the management and control of the immoral business conducted in said place is also subject to deportation. The Immigration Act of 1917 contains no such provisions.

In *Lindsey v. Dobra*, 62 Fed. (2) 116, cited by appellee (Appellee's Brief, page 13) the warrant of deportation was based upon ground that the alien "managed . . . a place of amusement or resort habitually frequented by prostitutes or where prostitutes gather"; the Court held it was not necessary to establish that the alien was connected with or had an interest in the activities of the prostitutes who frequented his resort in that the existence of such connection or interest was not an element of the offense upon which the Secretary of Labor sought to deport the alien.

If counsel for appellee submits the Dobra Case as authority for the principle that it is not necessary to establish that the alien was connected with, or had no interest in, the activities of the prostitutes who are inmates of the houses of prostitutions over which the Government contends the appellant was manager or connected with the management, it must be apparent to the Court the appellee has drawn an erroneous conclusion as to the law declared in said opinion. The Immigration Record contains neither evidence nor finding tending to establish that appellant knowingly, or at all,

assumed "any responsibility for the carrying on or conducting of the inhibited business" operated in the Ardmore Rooms or the De Luxe Rooms.

### **Was a Fair Hearing Accorded?**

Appellant concedes the fairness of the proceedings had before the Immigration Service. This appeal is from errors in law that occurred during such proceedings.

3. Must an alien be caught in the act of receiving benefits from prostitutes, etc., at time of arrest to be comprehended within the statute directing deportation of such classes of aliens?

Appellee seeks to limit appellant's contention referred to in above question to the proposition that an alien must be caught in the acts of receiving benefits from prostitutes and "caught in the actual act of being connected with the management of a house of prostitution" (Appelle's Brief, page 18). Appellant presents no such point; he contends that under clause 6, Section 19, Act of February 5, 1917, the "alien . . . found connected with the management of a house of prostitution" shall be deported. On the other hand the alien who "shall receive, share in or derive benefit from any part of the earnings of any prostitute" or "any alien who manages . . . any house of prostitution" shall be deported. Appellant contends that as to charge that he was found connected with the management of a house of prostitution deportation proceedings must be brought at that time, and

if, the alien has terminated all connections with such inhibited business and refrains from participating therein for years, the Secretary of Labor has lost his right and authority to deport him for such conduct. Appellant raises no such contention as to the charge of "receiving, sharing in or deriving benefit from any part of the earnings of a prostitute" and the charge of "managing a house of prostitution"; to these charges appellant contends the facts found do not constitute any such deportable offense.

Appellant however does urge that the time fixed by the Immigration Act of 1917, during which an alien may be deported upon the grounds mentioned in said act by order of the Secretary of Labor, is not a statute of Limitation defining the time after the commission of any of the inhibited acts, during which an alien may be arrested and deported. The precise question here presented, as far as counsel has been able to discover by careful search, has not been before the Court. It seems that common justice would require some limitation should be placed upon the right of the Secretary of Labor to proceed in deportation of an alien who had led a moral and upright life for years after he had assisted a prostitute, received a few dollars from her earnings or been employed in a resort where prostitutes frequent. The law has placed limitations as to the time in which proceedings can be brought against the wrong-doer for nearly every crime except murder. Similar limitations should be applicable in cases of de-



portation when it appears that years have elapsed between the commission of the deportable offense and the issuance of warrant of arrest during which time the alien has refrained from having any interest in or connection with the inhibited business.

All of which is respectfully submitted.

WILLIAM H. WYLIE,  
H. P. LARSON BECK,  
HUGH A. SANDERS,

By.....  
William H. Wylie,



No. 9564

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In the  
United States  
Circuit Court of Appeals  
For the Ninth District 16

TOM WING ART, alias WING FOOK  
TOM, alias SHORTY YUEN,

*Appellant,*

vs.

WILLIAM A. CARMICHAEL, Dis-  
trict Director of U. S. Immigration  
and Naturalization Service, District  
No. 20,

*Appellee.*

Upon Appeal from the District Court of the United  
States for the Southern District of California,  
Central Divisions.

**APPELLANT'S PETITION FOR  
RE-HEARING**

WILLIAM H. WYLIE,  
H. P. LARSON BECK,  
HUGH A. SANDERS,

San Diego Trust & Savings Bldg.,  
San Diego, Calif.,

*Attorneys for Appellant*

---

**FILED**

FEB 10 - 1941

PAUL B. BORDEN





In the  
United States  
Circuit Court of Appeals  
For the Ninth District

No. 9564

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TOM WING ART, alias WING FOOK  
TOM, alias SHORTY YUEN,  
*Appellant,*

vs.

WILLIAM A. CARMICHAEL, Dis-  
trict Director of U. S. Immigration  
and Naturalization Service, District  
No. 20,  
*Appellee.*

---

PETITION FOR RE-HEARING

To the Honorable, the Judges of the above-entitled  
Court:

TOM WING ART, Appellant in the above-entitled matter, respectfully requests the above-entitled Honorable Court that he be granted a re-hearing in the above-entitled cause after adverse decision made and entered on January 9th, 1941, affirming the action of the United States District Court for the Southern District of California, Southern Division, dismissing writ of habeas corpus, and as grounds for said re-hearing the appellant respectfully set forth the following:

That the Learned Court has rested its decision upon the sufficiency of the evidence to sustain the findings of the Attorney General, a matter conceded by Appellant in his briefs, without mentioning or giving any consideration to the point raised by Appellant in this appeal, to-wit: That the facts set forth in those findings were not sufficient to constitute any of the deportable offences stated in the warrant of deportation under which the Immigration authorities were seeking to deport the Appellant. This point involves not only the application of the Immigration Laws of the United States to the facts in the present case but, also, the interpretation thereof as well as the authority of the Attorney General derived from said laws; questions of law within the jurisdiction of the United States District Courts and subject to review by such Courts in Immigration matters by writ of habeas corpus.

### ARGUMENT.

The Learned Court, in the opinion filed, disposes with Appellant's case and the legal questions raised in his brief, in the following language:

“The assertion, in appellant's brief, that the record contains no evidence that appellant managed or was connected with the management of a house of prostitution or received, shared in or derived benefit from the earnings of a prostitute, is unwarranted and false. The record reeks with such evidence.”



Appellant, in his brief and counsel during the oral argument before the Learned Court, conceded "that the record contains evidence" sufficient to support the findings made by the Attorney General and that the facts so found establishes that appellant has committed acts and pursued a course of conduct condemned by society as detrimental to its general welfare and highly immoral. However, appellant in this appeal presents an entirely different question, to-wit: Whether the facts before the Learned Court, the immoral acts and immoral conduct found by the Attorney General to have been committed or pursued by appellant, constitute any of the offense set forth in the warrant of deportation: a question of law involving the construction and interpretation of Section 19, Immigration Laws of February 5, 1917.

Appellant, by his appeal, seeks to have a judicial construction and interpretation of the language used by Congress in said Section 9, particularly as to the offenses mentioned in clauses 6 and 7 thereof, and a determination whether the facts found by the Attorney General are sufficient to constitute any of these offenses. The Learned District Court having dismissed the writ of habeas corpus by a minute order that "Petition for Writ of Habeas Corpus is denied," Transcript, page 16, without any discussion or mention of the legal questions raised by Appellant

The construction and interpretation of legislative en-

actments has, at all times since the adoption of the Constitution, been a subject of long and heated controversies among the members of the Bench as well as among members of the Bar. That counsel may not be in accord with the views and opinions of this Learned Court as to the construction and interpretation of the language used by Congress in clauses 6 and 7, Section 19, Immigration Laws of February 5, 1917, is not an unusual situation; such a disagreement between counsel and the Court upon a question of law, should not be brushed aside with a statement that appellant's assertion as to his position "is unwarranted and false."

Counsel's construction and interpretation of the language used by Congress in clauses 6 and 7 of Section 19, of said Immigration Laws, may be erroneous, but as it involves no question of fact, it cannot be "false." Appellant has consistently stood upon the proposition that the facts found by the Attorney General are insufficient, as a matter of law, to constitute the deportable offenses set forth in the warrant of deportation issued in the present case.

The record contains nothing whatsoever impugning counsel's good faith in the prosecuting of the present appeal nor in the argument made in support thereof. If counsel be mistaken in his contentions as to the proper construction and interpretation to be placed upon clauses 6 and 7, Section 19, of said Immigration Laws, the error is one in his understanding of the law, not from the lack of his appreciation of his obligation to be

fair, open and truthful to the profession that he follows and to the tribunals established to dispense justice to all alike.

Counsel has been in the practice involving Immigration Laws of the United States for more than twenty years, and knows the futility of seeking a judicial review, by writ of habeas corpus, of the findings of fact of an administrative bureau; would not knowingly waste his own time and efforts in bringing such a proceeding, let alone the time and energy of this Learned Court.

Counsel has been active in his chosen profession for almost forty years and has never, knowingly made any false or unwarranted statement to the Court or made any assertion as to the existence of any fact or any condition that he did not believe was warranted by the facts and circumstances within his knowledge; nor has he knowingly urged upon the Court any principle of law or theory as to what the law should be, that he did not believe to be true and tended to throw light upon the question at issue before the Court.

The appeal involves a study of the language used by Congress in clauses 6 and 7, Section 19, Immigration Laws of February 5, 1917, not simply a reading of the evidence contained in the Immigration record to determine whether it "reeks" with evidence of immortality.

The control, regulation and suppression of sexual immorality and other personal vices that are detrimental



to the public welfare are matters of police vested in the state and local authority. The Federal Government has but a limited and exceptional power over such matters, and Congressional legislation upon such subjects must be strictly construed. Appellant's contention, in present appeal, is that clauses 6 and 7, Section 19, Immigration Laws of February 5, 1917, do not empower the Attorney General to deport an alien for the acts and conduct found by him in the case at bar, and that his legal conclusion that they so do, is subject to review by the Court like any other matter of law that arises in a proceeding before an administrative bureau.

Counsel holds no brief for immorality in any of its forms; on the other hand, counsel, in conformity with his oath as an officer of this Honorable Court, stands ever ready to protect and defend the civil liberties and Constitution rights to all that claim his service. Counsel, in fulfilling this obligation, takes the position that no man is so low, so vile, so immoral, so deep in iniquity that he is beyond the protection of our laws or forbidden to enter our Courts that he may be sheltered under the shield of Justice. In these United States we have no "untouchables" to whom the Temples of Justice are closed. The cry of "unclean" in this country is not a call to be unjust.

Appellant is an alien, lawfully admitted in to the United States, and who, has resided therein over fifteen years; an alien resident entitled to the protection of the Constitution of the United States and its laws. The vil-

est creature, under the Constitution and the laws of the United States, has the right to have the laws of the land applied in determining any cause in which he may become involved, with the same force and effect as in the cause of the most righteous and most respected member thereof. No man, however, immoral or unworthy he may be, is beyond the protection of the Court or beneath the court's consideration.

Counsel concedes that the record "reeks" with evidence of sexual immorality and personal vices detrimental to the public welfare and offensive to the sensibilities of all right living citizens. Nevertheless, the obligation rests upon the Courts to delve into these offensive, ill-smelling acts of immorality and general depravity that the Attorney General has found to exist in the case at bar, and to determine for themselves whether such acts are of the kind and nature that Congress denounced as grounds upon which the Attorney General may deport a resident alien of the United States.

Appellant conceded, not only that the findings were *un*supported by the evidence, but that the acts and conducts so found to have been committed by appellant or pursued by him, were immoral and detrimental to the public welfare; perhaps violative of state and local laws and ordinances.

Appellant contends his appeal should be determined by a study of the Immigration Laws of February 5, 1917, Section 19, clauses 6 and 7, and an examination of

the facts found by the Attorney General; that is, the provisions of said clauses applied to the acts and conduct of appellant and a determination if such acts and conduct are within the specific immoral offense described in the Immigration Laws; and, not by the personal re-action of the members of the Learned Court against offenses involving sexual immorality generally.

That neither the Court nor the Attorney General has the authority or power to decide what aliens may or may not remain in the United States. That authority and power is vested in Congress alone as the legislative branch of our Government. Until Congress has spoken all aliens who have been lawfully admitted into the United States have a right to be and remain within the United States.

Congress has not assumed the power to regulate prostitution or to protect the general public from immorality in the various States, and neither the Immigration Service nor the Federal Courts should assume to exercise such police powers over the individuals of the several States. Prostitution, public immorality and those who are engaged in such reprehensible business or associated therewith are subjects of local control. The State in the exercise of that control must follow the rules and principles of the common law—and in prosecution of those who violate the local law the accused must be granted a trial by jury. Congress never intended that the U. S. Immigration Service or its officers or administrative bureaus should be an additional means



placed at the disposal of the local authority to aid in the control, regulation and suppression of prostitution whereby those who offend the local authority may be deported whenever the evidence be insufficient to warrant a conviction in the State Tribunals.

It being apparent from the opinion filed, that the Learned Court rested its decision upon the Immigration Record and failed to consider the Immigration Laws of the United States as to whether the warrant of deportation was supported by facts sufficient to bring said cause within the provisions of said Immigration Laws.

Perhaps such omission by the Learned Court to take into consideration the Immigration Laws upon the subject herein under controversy was the result of counsel's failure to state clearly the point upon which he relies as error of law. It is for the purpose of making a more successful effort by counsel to bring out the contention, that this petition for rehearing has been filed.

WHEREFORE upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment or order of court be upon further consideration reversed.

WILLIAM H. WYLIE,  
H. P. LARSON BECK,  
HUGH A. SANDERS,

By.....

*Attorneys for Appellant.*

I, counsel for the above-named appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WILLIAM H. WYLIE.

United States  
Circuit Court of Appeals  
For the Ninth Circuit. 17

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GUISEPPE MAITA,

Appellant,

VS.

EDW. L. HAFF, as District Director of Immigration  
and Naturalization for the Port of San Francisco, California,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United  
States for the Northern District of California,  
Southern Division.

FILED

1934-1940

PAUL P. O'BRIEN





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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GUISEPPE MAITA,

Appellant,

VS.

JOHN J. McGRATH, Commissioner of Immigration  
for the Port of San Francisco, California,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United  
States for the Northern District of California,  
Southern Division.





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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CHAUNCEY TRAMUTOLO,  
Attorney for Appellant,  
706 Alexander Bldg.,  
San Francisco, California.

FRANK J. HENNESSY,  
Attorney for Appellee,  
United States Attorney for the  
Northern District of California,  
Postoffice Bldg., San Francisco,  
California.

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In the Southern Division of the United States  
District Court for the Northern District of  
California.

N. 22925S

In the Matter of

GUISEPPE MAITA

on Habeas Corpus,

File No. 12020/28365

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable United States District Judge now  
Presiding in the United States District Court  
for the Northern District of California, South-  
ern Division.

The petition of Guiseppe Maita respectfully  
shows:



## I.

Guiseppe Maita hereinafter referred to as "the detained" is a native of Italy and a subject of the King of Italy.

## II.

The detained arrived in the United States from Italy in April, 1906, and he has resided in the United States continuously ever since said arrival with the exception of a brief trip to Mexico hereinafter referred to.

## III.

At the time of the detained's arrival in the United States [1\*] in April, 1906, he was examined by the United States immigration authorities for the Port of New York and as a result of said examination he was permitted by such immigration authorities to enter the United States for the purpose of permanent residence therein.

## VI.

On October 19, 1937, a warrant for arrest of alien was issued by the Secretary of Labor charging the detained as follows:

"that he has been sentenced, subsequent to May 1, 1917, to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude committed within five years after entry, to-wit: defrauding the United States of the tax on the spirits distilled by him."

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

A true copy of said warrant is annexed hereto, marked "Exhibit A" and made a part hereof. At the time said warrant was issued the detained was an incarcerated prisoner in the United States Penitentiary at McNeil's Island, Steilacoom, in the State of Washington. A purported hearing was accorded the detained while he was an incarcerated prisoner as aforesaid and said hearing took place in said penitentiary while the detained was there an incarcerated prisoner. The detained was then and there incarcerated in said penitentiary as a result of conviction on November 24, 1936, upon an indictment returned in the July 1936 Term of this court charging the detained and others as follows:

"That on the said day at the said place [on the 17th day of July, 1936, at a place known as the Paul Labarile Ranch located near Concord, County of Contra Costa, within said Division and District] the said defendants wilfully engaged in the business of a distiller of alcohol with intent to defraud the United States of the tax on the spirits distilled by them [26 USCA 1184]."

## V.

As a result of said hearing, it was found by the Secretary of Labor that the charge contained in the aforesaid warrant of arrest was sustained. A true copy of said finding is annexed [2] hereto, marked "Exhibit B" and made a part hereof. Whereupon the Secretary of Labor under date of

February 8, 1938 issued a warrant for the detained's deportation to Italy, a true copy of which warrant of deportation is annexed hereto, marked "Exhibit C" and made a part hereof.

## VI.

The detained is now in the custody of John J. McGrath, Commissioner of Immigration for the Port of San Francisco, State and Northern District of California, Southern Division thereof, who acting under the orders of the Secretary of Labor is ready and about to deport him to Italy on a vessel or railroad which leaves San Francisco, California, on February 6, 1939.

## VII.

Your petitioner alleges that the Secretary of Labor in issuing a warrant for the detained's deportation and the said John J. McGrath in holding the detained in custody so that his deportation may be effected are acting in excess of the power committed to them and each of them, in each of the following particulars, to-wit:

1. The crime of which detained was convicted as aforesaid is not a crime involving moral turpitude within the meaning of Section 19 of the Immigration Act of February 5, 1917:

2. There is no evidence to support the finding that the crime for which the detained was convicted and imprisoned was committed within five years after entry, in this: There is no evidence in the record showing exactly when the detained made a



visit to Mexico beyond a vague and uncertain admission by the detained that he was in Tia Juana “about four years ago”—“I think so, it was three or four months before the country went wet—it was in the summer”; [3]

3. The detained was not accorded a fair hearing by reason of the following facts: That the hearing was held while he was an incarcerated prisoner in a Federal penitentiary; that he was not represented by counsel; that there was no interpreter present; that he was interrogated entirely in the English language which he imperfectly understands and speaks evry poorly; that in view of his ignorance and illiteracy it was impossible for him to have understood the nature of the hearing, the questions that were put to him or to appreciate that he was entitled to counsel and the production of witnesses on his own behalf; that in view of his ignorance and illiteracy it was impossible for him to have given the answers which the record before the Department purports to indicate that he did give, and that the record upon which the Secretary of Labor has ordered the detained to be deported is not and cannot be a true and correct report of said alleged hearing.

Wherefore, your petitioner prays that a writ of habeas corpus issue directed to said Commissioner commanding and directing him to hold the body of said Guiseppe Maita within the jurisdiction of this court and to present his body before this court at

a time and place to be specified in said writ, together with the time and cause of his detention, so that the same may be fully inquired into to the end that he may be restored to liberty and go hence without day.

Dated at San Francisco, California, February 6, 1939.

CHAUNCEY TRAMUTOLO

Attorney for Petitioner. [4]

State of California,  
City and County of San Francisco—ss.

Guiseppe Maita, being first duly sworn, deposes and says:

I am the petitioner named in the foregoing petition. The same has been read and explained to me and I know the contents thereof and it is true of my own knowledge except as to those matters which are therein stated on information and belief and as to those matters I believe it to be true.

GUISEPPE MAITA

Subscribed and sworn to before me this 6th day of February, 1939.

[Seal] J. G. ROBERTS

Notary Public in and for the City and County of  
San Francisco, State of California. [5]

EXHIBIT A

WARRANT FOR ARREST OF ALIEN

United States of America, Department of Labor,  
Washington

389/11

No. 55962/802

To District Director of Immigration and Naturalization, Seattle, Wash., Or to any Immigrant Inspector in the Service of the United States.

Whereas, from evidence submitted to me, it appears that the alien Guiseppe or Joe Maita who entered this country at San Ysidro, Calif. during the year 1933, has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to-wit: The act of 1917, in that he has been sentenced, subsequent to May 1, 1917, to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude committed within five years after entry, to wit: Defrauding the United States of the tax on the spirits distilled by him.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with



law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1938." Pending further proceedings, the alien should be permitted to remain in his present location without expense to the Immigration Service. However, if released to the custody of this Service at any time before deportation is effected or before other final disposition is made of his case, he may be released under bond in the sum of \$1000.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 19th day of October, 1937.

TURNER W. BATTLE,

Assistant to the Secretary of  
Labor. [6]

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## EXHIBIT B

### SUMMARY—FINDINGS—

### RECOMMENDATIONS

Guisepppe or Joe Maita, the person made the subject of these proceedings is an alien, native and subject of Italy of full Italian race, 50 years of age, laborer by occupation. He appears to be of good physique, and at least of average intelligence. He is a married man, and claims to be the father of five American born children. His family all re-

side in Oakland and San Francisco, California. He claims to have no surviving relatives in Italy. He alleges that his father and mother resided in the United States for some years, and are both deceased, and were buried at Oakland, that neither of his parents ever secured citizenship in the United States. The alien alleges he did not secure final papers because he could not read or write. He claims to have no money on hand or in any bank, and does not own any property.

Alien alleges original entry to the United States at New York City April 1906, ex. SS. "Mauritania", which entry could not be verified. His last entry to the United States was at San Ysidro, California in the year 1933 on returning following a brief visit in Mexico, and at which time he did not pay headtax or surrender an unexpired immigration visa.

On November 24, 1936 he entered a plea of guilty in United States District Court San Francisco, California, to an indictment charging him with violation of Title 26, USCA 1184 (defrauding the United States of tax on spirits distilled) and was sentenced to imprisonment in a U. S. Penitentiary to be designated by the Attorney General of the United States for a period of 18 months, and a fine in the sum of \$100.00. In Exhibit "C" the subject admits previous sentence in the San Francisco County jail of one year for selling liquor, also previous sentence of 1 month in the San Francisco

County Jail, for bootlegging, and that he has been arrested about six times altogether. All arrests were for bootlegging.

He is subject to deportation for the following reasons, to-wit:

(1) Under the Immigration Act of 1917, in that he has been sentenced subsequent to May 1, 1917, to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude committed within five years after entry, to wit: Defrauding the United States of the tax on the spirits distilled by him.

Deportation is recommended.

WILLIAM G. McNAMARA

Immigrant Inspector

WGM.D

11-6, 1937

1320/2175 [7]



EXHIBIT C.

WARRANT—DEPORTATION OF ALIEN

United States of America  
Department of Labor  
Washington

No. 389/11

55962/802

To: District Director of Immigration and Naturalization, Seattle, Wash., District Director of Immigration and Naturalization, Ellis Island, N. Y. H. Or to any Officer or Employee of the United States Immigration and Naturalization Service.

Whereas, from proofs submitted to me, Assistant to the Secretary, after due hearing before an authorized immigrant inspector, I have become satisfied that the alien Guiseppe or Joe Maita, who entered the United States at San Ysidro, Calif., during the year 1933, is subject to deportation under section 19 of the Immigration Act of February 5, 1917, being subject thereto under the following provisions of the laws of the United States, to wit: The act of 1917, in that he has been sentenced, subsequent to May 1, 1917, to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude committed within five years after entry, to wit: Defrauding the United States of the tax on the spirits distilled by him.

I, the undersigned officer of the United States, by virtue of the power and authority vested in me by and under the laws of the United States, do hereby command you to deport the said alien to Italy, at the expense of the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1938", including the expenses of an attendant, if necessary.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 8th day of February, 1938.

-----  
Assistant to the Secretary of  
Labor.

[Endorsed]: Filed Feb. 6, 1939. [8]

-----  
[Title of District Court and Cause.]

### ORDER TO SHOW CAUSE

Good cause appearing therefor, and upon reading the verified petition herein:

It is hereby ordered, that John J. McGrath, Commissioner of Immigration for the Port of San Francisco, appear before this Court on the 20th day of February 1939, at the hour of ten o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued as prayed for, and that a copy of this order be served upon said Commissioner; and,

It is further ordered, that Guiseppe Maita, the petitioner herein, be not removed from the jurisdiction of this Court and [9] that he be released on furnishing bond in the sum of One Thousand Dollars (\$1,000) pending this hearing and until further orders herein.

Dated this 6th day of February, 1939.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Feb. 6, 1939. [10]

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[Title of Court and Cause.]

## RETURN TO ORDER TO SHOW CAUSE

Comes now John J. McGrath, as District Commissioner of Immigration and Naturalization for the Port of San Francisco, California, through Arthur J. Phelan as Inspector in Charge, Legal Division of the United States Immigration and Naturalization Service at said port regularly assigned hereunto by said District Commissioner of Immigration and Naturalization, and for cause why a writ of habeas corpus should not issue herein, shows as follows:

### I.

That the person in whose behalf the petition for writ of habeas corpus was filed, is detained by the respondent John J. McGrath, as District Commissioner of Immigration and Naturalization for the



port of San Francisco, California, under and by virtue of a warrant of deportation duly and regularly issued by the Secretary of Labor of the United States after a hearing duly and regularly held before an Immigrant Inspector of the United States.

## II.

That a true copy of said warrant of deportation and the record of the entire proceedings pertaining thereto are annexed hereto and made a part hereof as Respondent's Exhibit "A".

Wherefore, Respondent prays that the petition for writ of habeas corpus herein be denied.

ARTHUR J. PHELAN

Inspector in Charge, Legal  
Division as aforesaid, here-  
unto authorized for and on  
behalf of Respondent John  
J. McGrath, District Com-  
missioner of Immigration  
and Naturalization.

[Endorsed]: Filed May 20, 1939. [11]

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[Title of District Court and Cause.]

### SUPPLEMENTAL RETURN TO ORDER TO SHOW CAUSE

Comes now John J. McGrath, as District Commissioner of Immigration and Naturalization for

the Port of San Francisco, California, through Arthur J. Phelan as Inspector in Charge, Legal Division of the United States Immigration and Naturalization Service at said port, regularly assigned hereunto by said District Commissioner of Immigration and Naturalization, and supplementing the Return to Order to Show Cause heretofore filed herein, shows as follows:

I.

That subsequent to the entry of the order of this Court of April 22, 1939, and in conformity with said order, a further hearing was accorded the petitioner by the immigration authorities of the United States and at said hearing petitioner was given opportunity to present further evidence bearing upon the date of his last entry into the United States. [12]

II.

That upon the completion of such further administrative hearing the record thereof was submitted to the Secretary of Labor for final decision.

III.

That after a consideration of the record of the entire proceedings the Secretary of Labor ordered that no change be made in the previous decision ordering that petitioner be deported.

IV.

That the original record of the entire deportation proceedings, including the record of all hearings

held subsequent to this Court's order of April 22, 1939 and the decisions of the Secretary of Labor thereon, is annexed hereto and made a part hereof as Respondent's Exhibit "A".

Wherefore, respondent prays that the petition for writ of habeas corpus be denied.

ARTHUR J. PHELAN

Inspector in Charge, Legal  
Division as aforesaid, here-  
unto authorized for and on  
behalf of Respondent John  
J. McGrath, District Com-  
missioner of Immigration  
and Naturalization.

[Endorsed]: Filed Apr. 22, 1940. [13]

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In the Southern Division of the United States Dis-  
trict Court for the Northern District of Cali-  
fornia.

No. 22925-S

In the Matter of

GUISEPPE MAITA,

On Habeas Corpus.

### MEMORANDUM AND ORDER

While confined in the United States Penitentiary at McNeil Island, petitioner, after hearing, was, on October 21, 1937, ordered deported under the Act



of 1917 for the reason "that he has been sentenced, subsequent to May 1, 1917, to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude committed within five years after entry, to-wit: Defrauding the United States of the tax on the spirits distilled by him." Petition for writ of habeas corpus was filed on February 6, 1939. Order to show cause was issued, and return made. After hearing the matter was briefed and submitted. The court was impressed with the argument made on behalf of petitioner, and on April 22, 1939, made an order remanding the case to the Immigration Authorities for further hearing. The case was reopened and further testimony [14] taken. On April 22, 1940, a supplementary return was filed.

The vital question, which has twice been decided against petitioner by the Secretary of Labor, is the date of petitioner's last entry into the United States. According to his own admissions he visited Mexico and re-entered the United States in the summer of 1933, which brings him within the provisions of the deportation statute. 8 USCA 155.

Though an alien, petitioner has been in the United States for about thirty-four years, is married, and has five children. The case has sentimental appeal, but the court is without discretion and must follow the mandate of the law. "The correctness of the judgment is not to be determined by enquiring whether the conclusion drawn by the Sec-

retary of Labor from the evidence was correct or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found. The denial of a fair hearing is not established by proving merely that the decision was wrong. *Chin Yow v. United States*, 208 U. S. 8, 13." *Tisi v. Tod*, 264 U. S. 131, 133. There is nothing in the record showing that the hearing was unfair or that there was an abuse of discretion. It is therefore

Ordered that the petition for writ of habeas corpus be, and the same is hereby denied. Petitioner is hereby remanded to the custody of the Immigration Authorities for deportation.

Dated: May 9, 1940.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed May 9, 1940. [15]

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT, UNDER  
RULE 73B

Notice is hereby given that Guiseppe Maita, petitioner above-named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment denying his petition

for a writ of habeas corpus entered in this action on May 9, 1940.

Dated: June 18, 1940.

Signed: CHAUNCEY TRAMUTOLO

Attorney for Petitioner

Address: 706 Alexander Building  
San Francisco, Calif.

(Admission of Service)

[Endorsed]: Filed Jun. 18, 1940. [16]

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[Title of District Court and Cause.]

STIPULATION FOR DESIGNATION OF CON-  
TENTS OF RECORD ON APPEAL,  
UNDER RULE 75

Petitioner and appellant, Guiseppe Maita, designates the portions of the record, proceedings and evidence to be contained in the record on appeal herein, as follows:

1. Petition for writ of habeas corpus;
2. Order to show cause;
3. Return to order to show cause;
4. Supplemental return to order to show cause;
5. Order denying petition for writ;
6. Notice of appeal;
7. Order transmitting original exhibits;
8. This designation.



Dated: June 11, 1940.

Signed: CHAUNCEY TRAMUTOLO

Attorney for petitioner and  
appellant.

Address: 706 Alexander Building  
San Francisco, Calif.

So stipulated.

FRANK J. HENNESSY

United States Attorney

By LOUIS R. MERCADO

Assistant United States  
Attorney

[Endorsed]: Filed Jun. 18, 1940. [17]

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[Title of District Court and Cause.]

ORDER TRANSMITTING ORIGINAL  
EXHIBITS

It appearing to the Court that the Immigration records pertaining to the arrest of Guiseppe Maita, the appellant and petitioner herein, were introduced in evidence before and considered by the United States District Court in reaching its determination herein, and it appearing that said records are a necessary and proper exhibit for the determination of said case upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, it is therefore

Ordered, upon motion of Chauncey Tromutolo, attorney for appellant and petitioner herein, that said Immigration records may be withdrawn from the office of the Clerk of this Court and [18] filed by him in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, said withdrawal to be made at the time the record on appeal is certified to by the Clerk of this Court.

Dated San Francisco, June 18, 1940.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed July 3, 1940. [19]

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District Court of the United States, Northern  
District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 19 pages, numbered from 1 to 19, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of Guiseppe Maita, on Habeas Corpus No. 22925-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$2.90 and that the said amount

has been paid to me by the Attorney for the appellant herein.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 3rd day of July A. D. 1940.

[Seal]

WALTER B. MALING

Clerk.

J. P. WELSH

Deputy Clerk. [20]

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[Endorsed]: No. 9568. United States Circuit Court of Appeals for the Ninth Circuit. Guiseppe Maita, Appellant, vs. John J. McGrath, Commissioner of Immigration for the Port of San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 9, 1940.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.



United States Circuit Court of Appeals for the  
Ninth Circuit

No. 9568

GUISEPPE MAITA,

Appellant,

vs.

JOHN J. McGRATH, Commissioner of Immigra-  
tion for the Port of San Francisco,

Appellee.

STATEMENT OF POINTS AND DESIGNA-  
TION PURSUANT TO RULE 19, SUBDI-  
VISION 6.

### DESIGNATION

Appellant designates the entire record as neces-  
sary for consideration of the points hereinafter  
stated.

### STATEMENT OF POINTS

Appellant was not accorded a fair hearing by the  
Secretary of Labor and the order of deportation  
is not supported by evidence.

CHAUNCEY TRAMUTOLO

Attorney for Appellant.

Receipt of a copy of the foregoing Statement of  
Points and Designation Pursuant to Rule 19, Sub-

division 6, is hereby acknowledged this 18 day of July, 1940.

FRANK J. HENNESSY

United States Attorney

K

By .....

Assistant United States

Attorney.

[Endorsed]: Filed July 18, 1940. Paul P. O'Brien, Clerk.

No. 9568

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 18

GUISEPPE MAITA,

*Appellant,*

vs.

EDW. L. HAFF, District Director of Im-  
migration and Naturalization for the  
District of San Francisco, California,  
*Appellee.*

APPELLANT'S OPENING BRIEF.

CHAUNCEY TRAMUTOLO,

Alexander Building, San Francisco,

*Attorney for Appellant.*

FILED

AUG 23 1940

PAUL P. O'BRIEN,





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No. 9568

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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GUISEPPE MAITA,

*Appellant,*

VS.

EDW. L. HAFF, District Director of Immigration and Naturalization for the District of San Francisco, California,  
*Appellee.*

## APPELLANT'S OPENING BRIEF.

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*May it please the Court:*

This is an appeal from an order of the District Court of the Northern District of California, Southern Division, denying application for a writ of habeas corpus.

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## JURISDICTIONAL STATEMENT.

*The statute involved* is the Act of February 5, 1917, c. 29 §19, 39 Stat. 889, 8 U.S.C. §155, the pertinent portion of which reads as follows:

“\* \* \* any alien who, after February 5, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a

crime involving moral turpitude committed within five years after entry of the alien into the United States \* \* \* shall, upon the warrant of the Secretary of Labor, be taken into custody and deported."

*The jurisdiction of the District Court* is that familiarly exercised upon a petition for a writ of habeas corpus (T. 1-6) by an alien detained under a warrant of deportation issued by the Secretary of Labor (R.S. §451).

*The jurisdiction of this Court* is based upon the Act of February 13, 1925, c. 229 §6, 43 Stat. 940; 28 U.S.C. §463.

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#### **STATEMENT OF THE CASE.\***

November 24, 1936 appellant, a resident of San Francisco, California, was sentenced by the Court below to a term of eighteen months in the Federal Penitentiary at McNeil Island on his plea of guilty to a charge of engaging in the business of a distiller of alcohol, with intent to defraud the United States of the tax on the spirits distilled (R. 1, 5). While appellant was serving that sentence and while he was incarcerated in the penitentiary, an immigration inspector questioned him on January 13, 1937 and again on March 17, 1937 (R. 7, 15). Among other things, the record shows that appellant stated that he came to the United States from Italy in April, 1906 (R. 12) and further testified as follows:

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\*T. refers to printed Transcript of Record and R. refers to Immigration Record which is Respondent's Exhibits, original transmitted here.

“Q. Did you ever visit in Mexico?

A. One time I went to Tiajuana to see what it was like, that was about four years ago.

Q. You went just to Tiajuana?

A. Yes.

Q. Did the immigration officers talk to you when you came back?

A. They stopped me and that is all.

Q. How were you traveling, by stage or auto?

A. By auto, in my son's car.

Q. That was four years ago?

A. I think so, it was three or four months before the country went wet. It was in the summer.”

September 15, 1937 a warrant for appellant's arrest was applied for on the basis of the judgment of conviction and sentence and the statements of appellant quoted above (R. 16). October 19, 1937 the warrant of arrest issued, directing officers of the immigration service at Seattle to grant appellant a hearing (R. 17). October 27, 1937 an attorney at Washington, D. C., requested the Department of Labor there to notify him when the record of the hearing was received so that he might appear before the Board of Review at Washington in connection with the case (R. 18).

November 3, 1937 the hearing was held in the penitentiary at McNeil Island. Appellant was present without counsel. The record shows that he was informed of the purpose of the hearing, the warrant of arrest was read to him, he was advised of his right to counsel, he was asked whether he desired to be so represented and he replied that he did not, he was



asked whether he was ready to proceed and replied that he was (R. 39), the warrant of arrest was again read to him and he was asked what he had to say concerning the charge. The record shows he replied that he had a wife and five children in this country, that he had not been able to become a citizen of the United States because of the inability to read and write, that the charge contained in the warrant of arrest was true, that he knew what the evidence was but had nothing to say concerning it, that all the statements he had made to the inspector on January 13 and March 17 were true, and that he had no witnesses that he wished to testify in his behalf (R. 38). The record shows he was then asked if he had any further statement to make or any evidence to present before the hearing was closed, or anything which he wished to offer as a reason why he should not be deported, and he answered that he did not want to leave his wife and children and that he had no one in the old country (R. 38).

January 25 and February 2, 1938 appellant's Washington counsel appeared before the Board of Review at Washington, and subsequent thereto the warrant of deportation issued (R. 46), but at the request of appellant's counsel a stay was granted to afford an opportunity to apply for a pardon (R. 44). Application for a pardon was made and denied (R. 84). Thereupon, appellant's Washington counsel presented to the Secretary of Labor a petition for further stay of deportation on the ground of hardship (R. 80, 77) which was denied (R. 83).

Thereupon appellant's present counsel requested the Secretary of Labor to reopen the case, which request was denied (R. 88-91). Whereupon counsel supplemented the request for reopening by affidavits of applicant and also one Nuccio, alleging that appellant's trip to Mexico had occurred in April or May, 1929, and not in 1933 as appellant had stated on his preliminary examinations (R. 123, 130), which request was again denied (R. 137, 138).

February 6, 1939 appellant petitioned the Court below for a writ of habeas corpus, and on the same date an order to show cause issued.

April 22, 1939 the Court below made an order granting the application for the writ unless the immigration authorities would reopen the case and grant a further hearing (T. 17). The Secretary complied with the condition of the order and the case was reopened for further hearing.

At the further hearing four witnesses were called and examined: appellant, Isidoro Costanzo, Michael Nuccio and Maria Maita. Appellant testified in substance as follows (R. 166-164): he made but one trip to Tia Juana, Mexico, and that in the Spring of 1929, he went there in his own Dodge automobile which he had purchased in 1928, on the trip with him were Michael Nuccio and a man named Roberts whose present whereabouts he did not know, they stayed in Tia Juana about two hours around noon, while there the only person appellant saw whom he knew was Isidoro Costanzo, when examined by the immigration authorities appellant stated that he had made his trip



to Tia Juana three or four *years* and not three or four *months* before Repeal. Isidoro Costanzo testified in substance as follows (R. 167-168): he had known appellant fifteen or sixteen years was not related to him in any way and had never had any business dealings with him, he was in Tia Juana in the Spring of 1929 and while there saw appellant around noon in the Foreign Club. Maria Maita testified in substance as follows (R. 169-174): she is the wife of appellant and has five children, they reside in San Francisco and own their own home, appellant has owned two automobiles—first an old Overland purchased about 1922 and sold about 1927 and a Dodge purchased about 1928 and sold about 1930, appellant never owned an automobile after that, two of their sons owned automobiles and one of the sons went to Mexico with a young fellow in 1936 but appellant never went to Mexico with his son in an automobile, appellant went to Mexico with Nuccio and another man in 1929, the time is fixed as 1929 by reason of the fact that the trip to Mexico occurred about six months after the marriage of their daughter who was married in November, 1928. Michael Nuccio testified in substance as follows (R. 175-178): He is by occupation a bartender, he is a first cousin of appellant on his father's side and has known appellant approximately all of his life, he took a trip to Mexico in April or May of 1929 with appellant and a man named Roberts, the trip was made in appellant's Dodge automobile, the time when the trip was taken is fixed by reason of the fact that he had just finished junior high school in December, 1928 and was attending part-time school.



At this hearing appellant was examined through an interpreter. At his preliminary examinations in the penitentiary and the hearing held there, however, he was not examined through an interpreter but in the English language. The record shows that appellant does not read or write either the English or Italian language and that he has never had any schooling either American or Italian beyond three or four days when he first came to this country from Italy. Appellant's testimony also shows that although he has been in this country since 1906 his dealings have been mostly with Italian people and his speech is always in the Italian language. In all of the immigration proceedings excepting the last hearing he testified in the English language (R. 161-160).

April 22, 1940, a supplemental return to the order to show cause was filed incorporating the record of the final hearing, substance of which is outlined above, together with the decisions of the Department again finding appellant subject to deportation.

May 9, 1940, the District Court made its order denying the petition for writ of habeas corpus and remanding appellant to the custody of the immigration authorities for deportation (T. 16-18). From this order the present appeal is taken (T. 18).

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#### **STATEMENT OF POINTS.**

Appellant was not accorded a fair hearing by the Secretary of Labor and the order for deportation is not supported by evidence.

**ARGUMENT.**

The vital issue is whether appellant left the United States and reentered in 1929 or 1933. If he left and reentered in 1929 this was more than five years before his conviction in 1936 and he is hence not deportable under the statute. The determination of the Secretary of Labor rests entirely upon the purported admissions made by appellant at the penitentiary.

The course of administrative hearing was not fair because of a combination of circumstances. It may be granted that most of these circumstances, taken singly, have been held not sufficient to invalidate an order of deportation. Thus in some circumstances an order of deportation may be rested upon an alien's admission.

*Ikeda v. Carr*, 9 Cir., 68 Fed. (2d) 276;

*Keitaro v. Burnett*, 9 Cir., 68 Fed. (2d) 278.

Likewise want of counsel is not a determinative circumstance.

*Bilokumsky v. Tod*, 263 U.S. 149, 155-156;

*Medich v. Burmaster*, 8 Cir., 24 Fed. (2d) 57, 59.

And the fact that the hearings were held in a penitentiary is not alone sufficient to demonstrate unfairness.

*Ciccerelli v. Curran*, 2 Cir., 12 Fed. (2d) 394.

And claims of misunderstanding have been held insufficient in proper circumstances to shake the Secretary's reliance upon an alien's admission.

*Leffer v. Nagle*, 9 Cir., 22 Fed. (2d) 800;

*Cahan v. Carr*, 9 Cir., 47 Fed. (2d) 604;

*Re Fukumoto*, 9 Cir., 53 Fed. (2d) 618;

*Greco v. Haff*, 9 Cir., 63 Fed. (2d) 863;

*Ung Bak Foon v. Prentis*, 7 Cir., 227 Fed. 406.

Let it be observed however that all of these cases contained a factor or several factors which saved the departmental hearings against a charge of unfairness. Thus, *Leffer*, *Greco*, *Fukumoto* and *Ung Bak Foon* were represented by counsel; and *Ikeda* and *Fukumoto* were granted numerous administrative continuances and hearings; and the admissions of *Cahan*, *Leffer*, and *Fukumoto* were corroborated by independent evidence. In other words in these cases at least one of the following factors—or generally a combination of them—appeared: representation by counsel; a real opportunity—afforded by the department—to marshal evidence and to produce witnesses; and a disposition to take and hear evidence independent of the alien's admission.

At bar we have an ignorant and illiterate Italian incarcerated in a penitentiary many miles from his home and his friends. His ability to understand and to make himself understood is imperfect. He is examined while incarcerated and without counsel; and upon the basis of a purported admission there wrung from him concerning the exact time of an event which had occurred many years before he is ordered deported. Upon this admission alone, so secured, the Secretary was not only content but actively insistent upon standing as a basis for deportation. There was not only no disposition on the part of the Secretary to test the admission by independent evidence, there was active opposition from the Secretary to such a



course. Appellant's proffer of independent evidence was met with closed eyes and a denial to reopen; and when independent evidence was taken, it was heard only under the compulsion of an order of the District Court.

The course of administrative procedure and the result reached in this case stand in unfavorable comparison with the case of

*Nagle v. Eizaguirre*, 9 Cir., 41 Fed. (2d) 735, where a like admission was exacted from a flustered alien upon his arrest in a house of prostitution. In that case, unlike the case at bar, the Secretary granted the alien further hearings notwithstanding his original unfavorable admission which rendered him subject to deportation; and since independent evidence adduced at the subsequent administrative hearings showed the unreliability of the alien's original admission the writ of habeas corpus issued notwithstanding the original admission, because the full hearing which due process requires brought out the true facts and so made reliance upon the alien's original admission arbitrary and capricious. The circumstances in which appellant at bar is alleged to have made the admission upon which the Secretary now stands we submit raise more doubts of its reliability than the circumstances in which Eizaguirre made his original admission. Furthermore, at bar appellant's alleged admission stands utterly uncorroborated whereas Eizaguirre's original admission was corroborated by the testimony of another witness; and notwithstanding this fact this Court held that the Secretary was unjustified in relying

either upon Eizaguirre's original admission or upon the evidence corroborating it in view of the true facts elicited at the subsequent administrative hearings.

It is submitted that appellant did not have a fair hearing and that the order of deportation is not sufficiently supported by evidence. The order should be reversed.

Dated, San Francisco,  
August 23, 1940.

Respectfully submitted,  
CHAUNCEY TRAMUTOLO,  
*Attorney for Appellant.*





No. 9568

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 19

GUISEPPE MAITA,

*Appellant,*

VS.

EDW. L. HAFF, District Director of Immigration and Naturalization for the District of San Francisco, California,

*Appellee.*

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

United States Attorney,

R. B. McMILLAN,

Assistant United States Attorney,

L. R. MERCADO,

Assistant United States Attorney,

Post Office Building, San Francisco,

*Attorneys for Appellee.*

ARTHUR J. PHELAN,

U. S. Immigration and Naturalization Service,

Post Office Building, San Francisco,

*On the Brief.*

FILED

SEP 8 1901

PAUL F. HENNING



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No. 9568

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

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GUISEPPE MAITA,

*Appellant,*

VS.

EDW. L. HAFF, District Director of Immigration and Naturalization for the District of San Francisco, California,

*Appellee.*

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**BRIEF FOR APPELLEE.**

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**JURISDICTIONAL STATEMENT.**

Appellant, an alien in custody under a warrant of deportation (Exhibit "A" p. 46),<sup>1</sup> filed a petition (T. 1-6) for a writ of habeas corpus in the District Court, which had jurisdiction of said habeas corpus proceeding under 28 U. S. C. Sections 451-453.

Jurisdiction to review the District Court's order (T. 16-18) denying appellant's petition for a writ of habeas corpus is conferred upon this Court by 28 U. S. C. Section 463.

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1. For convenience, the numbering in pencil on the lower right hand corner of the pages of the immigration record will be used throughout this brief.

By order of this Court, entered pursuant to Section 8(b) of the Reorganization Act of 1939 (53 Stats. L. 561), Edward L. Haff has been substituted as appellee for and in place of John J. McGrath.

---

**STATEMENT OF THE CASE.**

The deportation order is based upon that portion of Section 19 of the Immigration Act of February 5, 1917 (8 U. S. C. Section 155), which reads as follows:

“\* \* \* except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States \* \* \* shall, upon the warrant of the Secretary of Labor,<sup>2</sup> be taken into custody and deported.”

Appellant has been convicted and sentenced to imprisonment for a term of eighteen months for the offense of engaging in and carrying on the business of a distiller of alcohol with intent to defraud the United States of the tax on the spirits distilled (Ex. “A” pp. 6-1). The only fact in dispute is whether appellant’s last entry into the United States occurred less than five years before the offense was committed.

On January 13, 1937, shortly after appellant was received at the Federal Penitentiary at McNeil Island, he was questioned under oath by an immigration

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2. This function has since been transferred to the Attorney General.



officer relative to his right to be and remain in the United States (Exhibit "A" pp. 15-11). At that time he stated that he first came to the United States in April, 1906, and that he had subsequently made a visit to Mexico, "*about 4 years ago*" (Id. p. 12). Questioned further as to that visit, he stated that he had traveled "by auto, in my son's car" (Id. p. 12). He was then asked the following question and gave the following answer:

"Q. That was four years ago?

A. I think so, *it was three or four months before the country went wet*. It was in the summer." (Id. p. 12.)

This testimony would definitely fix appellant's last entry as occurring in the summer of 1933. The offense referred to above was committed on July 17, 1936 (Exhibit "A" pp. 6-5).

Thereafter a warrant of arrest was issued by the Assistant to the Secretary of Labor (Exhibit "A" p. 17). A few days later an attorney at Washington, D. C., requested the Department of Labor at Washington to notify him when the record of the hearing was received so that he might appear before the Board of Review at Washington in appellant's behalf (Id. p. 18).

Subsequently a hearing was held at the penitentiary (Id. pp. 40-37). Appellant was informed of the purpose of the hearing, the warrant of arrest was read and explained to him, and he was advised of his right to counsel, which he waived (Id. p. 39). The charge in the warrant of arrest was again read to

him and he was asked what he had to say concerning it. He described his family ties in this country, stated that the charge contained in the warrant was true, as were the statements he had previously made to the inspector, and that he had no witnesses that he wished to testify in his behalf (Id. p. 38).

Upon receipt of the record of the hearing, the Board of Review at Washington heard appellant's Washington counsel in oral argument on January 25 and February 2, 1938. The memorandum of the Board discusses the facts and the contentions then made by counsel (Id. pp. 45-44). It will be observed that at that time no contention was made that appellant's last entry had occurred earlier than as shown in his preliminary examination.

The warrant of deportation was then issued (Id. p. 46) but at the request of appellant's Washington counsel a stay was granted to afford appellant an opportunity to apply for a pardon and, since his sentence had expired, release on bail was directed (Id. p. 44).

Application for a pardon was subsequently made (Id. pp. 67-59). In that application it was stated that appellant had made a short visit to Mexico "*in 1933*" (Id p. 66).

Failing to obtain a pardon (Id. p. 84), appellant's Washington counsel presented to the Secretary of Labor a petition for a further stay of deportation on the grounds of hardship (Id. pp. 80-77) which was denied (Id. p. 83). Up to that point no contention was made that appellant had last entered the United States earlier than as theretofore stated.



Thereafter, appellant's present counsel requested the Department to reopen the case (Id. pp. 89-88), later supplementing his request with a formal petition of appellant wherein he represented "that his trip to Tiajuana, Mexico, occurred either in the month of April or May, 1929" (Id. p. 130) and with an accompanying affidavit of one Nuccio, alleging that affiant had accompanied appellant to Mexico during April or May, 1929 (Id. pp. 126-125).

The petition for reopening of the case was denied at that time (Id. pp. 138-137), but the case was subsequently reopened (Id. p. 152) pursuant to an order of the Court below remanding the case to the immigration authorities for further hearing to give appellant opportunity to present further evidence (Id. p. 150).

At the hearings on reopening (Id. pp. 182-159) Nuccio testified that he made a trip to Mexico with appellant in April or May, 1929, traveling in appellant's automobile (Id. pp. 177-175). Appellant's wife testified that such a trip of her husband occurred in 1929 (Id. p. 171). At first she testified that she could not swear that her husband had not made a trip to Mexico with his son but later said that she could swear that he had not done so (Id. p. 172). Another witness, Costanzo, testified that he had seen appellant in Mexico in April or May, 1929 (Id. p. 167). Appellant himself testified that he had gone to Mexico on only one occasion, that he traveled in his own car with Nuccio at that time, and that the trip occurred seven or eight months after his daughter was married in 1928 (Id. pp. 165-164).



Regarding the examination at the penitentiary appellant gave the following testimony:

“Q. You were examined, Mr. Maita, by the Immigration Department at McNeil Island; is that correct?

A. Yes.

Q. And did you know at that time when you went to Tiajuana, Mexico?

A. No, I wasn't thinking of it. *I told them it was two or three years previous to that time, but I couldn't give the time.*

Q. The record shows you were examined at McNeil Island in January, 1937; is that correct?

A. That was the time I was there, and when I was asked when I went to Mexico, *I told them it was three or four years before repeal*, but at that time I couldn't think of the exact time.

Q. The record shows you testified that you went three or four months before repeal. Did you give that testimony?

A. I told them it was *three or four years before the time they examined me*, but I do not know what they put down.

Q. Which is correct: Did you go to Tiajuana, Mexico, three or four months before repeal, or three or four years?

A. *Three or four years before the repeal of Prohibition.*” (Italics supplied.)

Thereafter the Department considered the case further and ordered that no change be made in the outstanding order of deportation (Exhibit “A” pp. 186-184).

At a subsequent hearing (Id. pp. 201-199) reports of the immigration officials of the Seattle District

who had participated in the examination and hearing at the penitentiary were introduced (Id. pp. 197-194).

By supplemental return in the habeas corpus proceedings the entire record was returned as an exhibit (T. 14-16). Thereafter on May 9, 1940, the Court below entered its order that the petition for writ of habeas corpus be denied (T. pp. 16-18).

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### QUESTIONS INVOLVED.

The questions before this Court, we submit, are properly to be stated as follows:

1. Was there "any evidence from which the conclusion of the administrative tribunal could be deduced"? (*Branch v. Cahill*, (CCA-9), 88 F. (2d) 545, 546.)
2. Was appellant denied a fair hearing?

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### ARGUMENT.

The statute (8 U. S. C. Section 155) specifically provides that

"In every case where any person is ordered deported from the United States under the provisions of this sub-chapter, or of any law or treaty, the decision of the Secretary of Labor shall be final."

The applicable rule is well stated by Mr. Justice Brandeis in

*Tisi v. Tod*, 264 U. S. 131, 133, 44 S. Ct. 260,  
261, 68 L. Ed. 590, 591,

as follows:

“We do not discuss the evidence; because the correctness of the judgment of the lower court is not to be determined by enquiring whether the conclusion drawn by the Secretary of Labor from the evidence was correct or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found.”

“The denial of a fair hearing is not established by proving merely that the decision was wrong. *Chin Yow v. United States*, 208 U. S. 8, 13. This is equally true whether the error consists in deciding wrongly that evidence introduced constituted legal evidence of the fact or in drawing a wrong inference from the evidence.”

It has repeatedly been held that statements made by an alien prior to issuance of a warrant of arrest may properly be introduced in evidence at the subsequent hearing under the warrant of arrest, and that the weight to be accorded such statements, like that to be accorded all the other evidence in the case, is a question solely for the administrative authorities.

For example, in

*Ikeda v. Burnett* (CCA-9), 68 F.(2d) 276, the alien had testified that he was in Mexico at the time of the Japanese earthquake (September 1, 1923), and for about six months thereafter. At subsequent hearings upon the warrant of arrest he testified that



he came to the United States four or five months before the earthquake, and that he had been mistaken in his earlier statement. He also offered witnesses in corroboration of his claim of earlier entry. This Court said:

“Under these circumstances the immigration authorities were not bound to accept his testimony that he entered the United States prior to July 1, 1924. The credibility of witnesses is a matter exclusively for the department, unless it can be said from the record that the refusal to ascribe credit to such testimony is arbitrary. (See *Wong Fat Shuen v. Nagle*, 7 F.(2d) 611; *Imazo Itow v. Nagle*, 24 F.(2d) 526; *Leffer v. Nagle*, 22 F.(2d) 800.)

\* \* \* \* \*

“In view of the statement of the appellant under oath that he was in Mexico about six months after September 1923, the immigration authorities cannot be said to have acted arbitrarily in rejecting the testimony of appellant’s witnesses to the effect that he was seen by them in the United States prior to that date. Honest witnesses are apt to be mistaken in dates and dishonest ones have little to fear from deliberate falsehood as to dates because of that fact.”

Likewise, in

*Kishimoto v. Carr* (CCA-9), 32 F.(2d) 991,  
in a similar situation, this Court said:

“On the hearings where appellant was represented by counsel, he testified that he had entered the United States in 1921 and had remained therein continuously thereafter. Appellant claims that the order of deportation is erroneous be-

cause he had been present in the United States more than five years. His statements upon arrest, which he reiterated on April 26 and April 28, that he had last entered the United States in August, 1924, justified the contrary conclusion, and was sufficient basis for the order of deportation (*Chan Wong v. Nagle* (C. C. A.), 17 F.(2d) 987)."

In

*Cahan v. Carr* (CCA-9), 47 F.(2d) 604, wherein there was a denial of earlier admissions attributed to the alien and where he contended that he was intoxicated at the time the alleged admissions were said to have been made, his Honor Circuit Judge Dietrich said:

"Upon the questions whether the admissions were made and whether the alien was intoxicated at the time, there was a direct conflict in the testimony, and the want of jurisdiction in the courts to inquire into such conflicts is too well settled to require citation of authorities."

In

*Karamoto v. Burnett* (CCA-9), 68 F.(2d) 278, the crucial question was whether the alien had entered before or after the date of the President's Proclamation issued on March 14, 1907. In the preliminary examination he had stated that he had entered in May, 1907. At the subsequent hearing, when represented by counsel, he testified that he entered in May 1906 and stated that he did not remember having said that he came in 1907. This Court said:

"There is evidence in the record to support the finding of the administrative officers, and it is,

therefore, conclusive on this Court. The refusal to accept appellant's testimony that he entered in 1906, after first testifying he entered in 1907, was not arbitrary."

The applicable rules are thoroughly discussed in the decision of this Court in the case of

*Koga et ux. v. Berkshire*, 75 F. (2d) 820, wherein this Court said:

"There was conflict in the testimony between that given at the time of arrest and that given at the hearing. The Board believed the former testimony and made its findings accordingly. This court said in *Chin Share Nging v. Nagle, etc.*, 27 F. (2d) 848:

"\* \* \* The conclusions of administrative officers upon issues of fact are invulnerable in the courts, unless it can be said that they could not reasonably have been reached by a fair minded man, and hence are arbitrary."

"Where the issue rests upon conflicting testimony, the court is not at liberty to review an administrative finding, unless in some other particular the conduct of the officers was such as to render the hearing unfair. *Wong Nung v. Carr, etc.*, 30 F. (2d) 766 (C. C. A. 9).

'For where there is jurisdiction a finding of fact by the executive department is conclusive, \* \* \* and the courts are not at liberty to interfere unless there was either denial of a fair hearing, \* \* \* or the finding was not supported by the evidence, \* \* \* or there was an application of an erroneous rule of law. \* \* \*'

"*Ng Fung Ho, etc. v. White*, 259 U. S. 276, 284. The Board was entitled to look to both examina-



tions in its search for the truth. *Ung Bak Foon v. Prentis*, 227 Fed. 406, 409 (C. C. A. 7); *Prentis v. Seu Leong*, 203 Fed. 25, 28 (C. C. A. 7). There can be no conclusion but that appellants were given a fair hearing.”

Again, in the case of

*Leffer v. Nagle* (CCA-9), 22 F. (2d) 800, 801, involving admissions made in the course of the preliminary investigation, which the alien later repudiated, contending that her hearing was seriously impaired and that she must have misunderstood the questions, this Court said:

“While under the circumstances the testimony touching her admission is not highly convincing, after all, upon established principles, its probative value, as that of any other conflicting testimony, was for the department, and the courts are not at liberty to disturb its findings.”

Clearly therefore, it was for the administrative tribunal, and not for the courts, to balance the admissions of appellant against the subsequent testimony to the contrary. Where an admission is put into evidence it is not at all uncommon for the party later to repudiate it on claims of misunderstanding, inadvertence, mistake, etc., as the cases above cited well illustrate. It has, however, never been held that on habeas corpus the courts may try the truth of the facts as to whether the admission was made, or as to its relative weight, if made. In each of the cases cited it was held that these are questions for the trial tribunal which cannot be determined on habeas corpus.

“It hardly needs to be said that a writ of habeas corpus can never be used for the purpose of correcting erroneous conclusions of fact drawn by those charged by the law with the duty of ascertaining the facts.”

*U. S. v. Wong Lai* (CCA-9), 270 F. 57, 59.

We submit that the questions of whether the admission was made and its weight if made, were solely for the administrative officers to decide. This is particularly so in the light of the following circumstances: (1) The original statements that appellant had visited Mexico “about four years ago” and that “it was three or four months before the country went wet” are consistent, whereas in his repudiation of this testimony he admits stating that he had made such a visit “three or four years before the time they examined me” but contends that he *also* stated it was “three or four years before the repeal of prohibition”; the two statements referred to in the latter testimony would be wholly incongruous. (2) All other information given in the McNeil Island statement, consisting of many details as to appellant’s personal history and family, are admittedly correct. (3) In the application for pardon which appellant executed after his release from the penitentiary, it is definitely stated that he made a visit to Mexico “*in 1933*”; plainly this could not have been copied from the record of the McNeil Island statement because appellant was then in San Francisco, and the application for pardon was prepared by one A. N. Lanza of San Francisco (Id. p. 66) (note the claim of appellant’s wife at the subsequent hearing that she had written appellant



while he was still in the penitentiary advising him that the date of his visit to Mexico was 1929 (Id. p. 170)). (4) The reports of all the immigration officers who had dealings with appellant both in the penitentiary and later in San Francisco definitely indicate that they had no trouble in understanding appellant nor in making appellant understand (Id. pp. 197-194, 157).

The testimony of Nuccio and Costanzo does not of itself negative the testimony of appellant that he was in Mexico in 1933 and had gone there in his son's car. True, appellant in his later testimony denies that he made more than one trip and his wife supports him in that denial, although the extent of her personal knowledge on that point is not positively shown. However, the weight of their testimony as balanced against the earlier statements is, we submit, for the determination of the administrative tribunal, whose decision is made final by the statute.

We see no merit in appellant's attempt to distinguish the cases we have cited above. One asserted basis of distinction is that the aliens in those cases had counsel. In those cases, however, the aliens did not have counsel until after the disputed statements were made. Obtaining a statement from appellant while he was in custody and before he secured the services or advice of counsel did not constitute an invasion of his right to a fair hearing (*Kishimoto v. Carr*, supra, and cases cited therein). The fact that appellant did not have counsel attending the formal hearing under the warrant of arrest at McNeil Island is due to his own waiver; counsel had already been



engaged at Washington but apparently appellant did not desire the presence of counsel at the hearing at McNeil Island.

Another suggested basis of distinction advanced by appellant is that in the cases we have cited there was a real opportunity afforded the aliens to be heard. We submit that there was such opportunity in the case at bar. It is true that there was at first a denial of the application to reopen the case, on the ground that the supporting affidavit submitted therewith (i. e., the affidavit of Nuccio) would not negative the alleged visit to Mexico in 1933 but at most would tend to show another visit in 1929 (Id. pp. 138-137). However, complete opportunity to submit further evidence was afforded after the District Court's order remanding the case for that purpose. The evidence then introduced was carefully considered (Id. pp. 186-184), and this resulted in adherence to the former decision. Thereafter, the complete record was again reviewed by the District Court and the Court was then satisfied that there had been no unfairness and no abuse of discretion (T. 18).

We submit that the attempt to distinguish the authorities cited above is without substance. There are numerous other decisions to the same effect, but those cited sufficiently illustrate the settled rule.

We submit that the case of

*Nagle v. Eizaguirre*, 41 F. (2d) 735,  
is not in point. In that case the arresting officers found the alien in the establishment of a prostitute. The prostitute at that time made a statement to the

officers wherein she asserted that the alien was employed by her in the house of prostitution as a cook. At the same time the alien confirmed her story in a similar statement. Subsequently it developed beyond question that the alien had in fact been employed in a mine at the time of his arrest, and for a number of years prior thereto, and that the prostitute had fleeced him of several thousand dollars by playing upon his sympathies and obtaining money from him at various times, ostensibly as loans. In the words of this Court in that case:

“The testimony as a whole leaves no room for doubt that this prostitute fleeced the appellee of considerable sums of money and is now attempting to discharge her obligations by deporting him from the country.”

In that case the first statement of the alien that he was employed as a cook in the house of prostitution was unquestionably false and was obviously made to avoid creating a conflict between his own account of his presence there and that given by the woman. We submit that the case is in no wise analogous to the case at bar.

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### CONCLUSION.

We submit that the case at bar is merely one involving a determination by the statutory tribunal based upon conflicting evidence, that its decision thereon is conclusive and that appellant was not denied a fair hearing.

It is further submitted that the decision of the Court below was correct and should be affirmed.

Dated, San Francisco,  
September 23, 1940.

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No. 9568

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 24

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GUISEPPE MAITA,

*Appellant,*

VS.

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*Appellee.*

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APPELLANT'S REPLY BRIEF.

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FILED

JUL 27 - 1924

PAUL D. GUTHRIE





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*Appellee.*

## APPELLANT'S REPLY BRIEF.

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*May it please the Court:*

The appellee's brief endeavors to dismiss the case of *Nagle v. Eizaguirre*, 9 Cir., 41 Fed. (2d) 735, by stating it is not in point and not analogous. The case is not only in point; on the facts it is weaker than the case at bar.

In the *Eizaguirre* case, the order of deportation was based not upon a mere admission by the alien alone; the admission was corroborated by another witness. But notwithstanding that, this court held that the admission even though corroborated was not sufficient to sustain the order of deportation.



In the case at bar the order of deportation rests upon a repudiated uncorroborated admission exacted in circumstances more unfair and unreliable than those in which Eizaguirre found himself.

It is respectfully submitted that *Nagle v. Eizaguirre* is squarely controlling and that the order should be reversed.

Dated, San Francisco,  
October 2, 1940.

Respectfully,  
CHAUNCEY TRAMUTOLO,  
*Attorney for Appellant.*











